Central Law Journal.

ST. LOUIS, MO., MARCH 21, 1902.

RIGHT OF LEGISLATURES TO ABRIDGE THE POWER OF COURTS TO PUNISH FOR CONTEMPT.—In some quarters there has been a strong tendency to curtail the power of courts to punish for contempt. Probably the mainspring of this tendency is to be found in the hard feelings which have been engendered by the action of the courts in the settlement of the great labor controversies of the last few years in which the right to punish for contempt has been exercised with as free a hand as the right to grant an injunction in the first instance. This has brought the general subject of contempt into great prominence and there has been a strong demand for abridgment of the present rights of courts in contempt cases. The recent case of Smith v. Speed, 66 Pac. Rep. 511, presents an instance of this tendency and the effort the courts are making to check it. It appears that the legislature of Oklahoma enacted that contempts should consist of two kinds: those committed in the presence of the court, and indirect contempt, such as willful disobedience or resistance to the execution of any process or lawful order of the court, and providing further that in cases of indirect contempt the party charged shall be notified in writing, have a reasonable time for defense, and may demand a change of judge or venue and a trial by jury. The court held this act to be unconstitutional on the ground that the legislature had no power to take away from the courts whose jurisdiction originated in the organic act the right to punish a contempt, and to turn it over to a separate tribunal, and remove the hearing of it to another county, or to cause the matter to be submitted to a trial by jury. The most recent authoritative decision on this question is that of *Re* Debs, 158 U. S. 594, 15 Sup. Ct. Rep. 910, where the court, through Justice Brewer, says: "The power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. This is no technical rule. In order that the court may compel obedience to its order, it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency." See also to same effect: Watson v. Williams, 36 Miss. 331; Interstate Commerce Commission v. Brimson, 154 U. S. 447; Bradley v. State (Ga.), 36 S. E. Rep. 630; Brown v. Circuit Judge, 75 Mich. 274; Hale v. State (Ohio), 45 N. E. Rep. 199.

DUTY OF ATTORNEY TO DEFEND PRISONER WHOM HE MAY BELIEVE TO BE GUILTY.—Laymen not infrequently charge the lawyer very unjustly for permitting his services to be retained in defending some noted criminal toward whom the public mind is wildly inflamed and whom he may believe to be guilty. It has been a difficult task of the profession, in standing up for its privileges and duty in this regard, to convince the public that no lawyer has the right to injure his fellowman's defense by judging his case without trial. No better argument has ever been advanced than that offered by Lord Erskine in vindicating himself from the public odium which attached to him by reason of his defense of Thomas Paine. The great barrister said:

"In every place where business or pleasure collects the public together day after day, my name and character have been the topic of injurious reflection, And for what? Only for not having shrunk from the discharge of duty which no personal advantage recommended, and which a thousand difficulties repelled. * * * * Little, indeed, did they know me, who thought that such calumnies would influence my conduct. *I will forever, at all hazards, assert the dignity, independence and integrity of the English bar*, without which impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend from what he may think of the charge or of the defense, he assumes the character of the judge

—nay, he assumes it before the hour of judgment; and in proportion to his rank and reputation, puts the heavy influence of perhaps a mistaken opinion in the scale against the accused, in whose favor the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel."

NOTES OF IMPORTANT DECISIONS.

TRIAL AND PROCEDURE—ERROR IN JUDGE GOING TO SLEEP DURING TRIAL.—Poor human nature sometimes exhausts itself even in the effort to do justice. In the making of laws and in their enforcement legislators and executive officers should continually bear in mind the weakness of human flesh and make some allowance for the man in whom "the spirit is willing, but the flesh is weak." A notable instance of the force of these observations is to be found in the recent case of Chicago City Railway Company v. Anderson, 61 N. E. Rep. 999, in which the Supreme Court of Illinois held that where a trial judge slept four or five minutes during the introduction of evidence, but neither party objected to his being asleep, or called his attention thereto, and no objection appeared to have been taken to evidence introduced during the period, it was not cause for reversal. The court said: "This trial occupied eight or nine days, and may have been conducted in such manner as to exhaust almost any one compelled to listen to it, as was the presiding judge. Conceding the irregularity of the presiding judge going to sleep while a trial is progressing, we cannot hold the mere circumstance of his having slept four or five minutes reversible error. If the judge was asleep, as certified, counsel must have known it, and knowing it they should either have suspended the examination of the witness then testifying until the judge awoke, or have awakened him by calling his attention, in a voice sufficiently loud to awake him, to the fact that the trial was progressing. Counsel did neither, but proceeded with the examination, and after the judge awoke failed to call his attention to the fact that testimony had been given while he was asleep, or to object in any way. It does not appear what testimony was taken while the judge was asleep, or that there is any objection to it, or that it was in the least, prejudicial to either party."

DIVORCE—IMPRISONMENT FOR DEBT IN CASES OF NON-PAYMENT OF ALIMONY.—We sometimes hear it stated broadly that there is to-day no imprisonment for debt. Technically speaking this is correct, but one apparent exception must be kept in mind, which is clearly illustrated by the recent case of *In re* Cave, 66 Pac. Rep. 425, where the Supreme Court of Washington held that where one who had been required by a decree in divorce to pay alimony refused to comply with an order that he pay the alimony forthwith, and he being then personally before the court, the court found that he had money in his possession with which he might obey the decree, the court had authority to punish him by immediate imprisonment until the order was complied with. Cases of this kind, of course, come within the power and jurisdiction of the court to punish for contempt. Statutes in many of the states provide that when a contempt consists in the failure or refusal of one to do an act which he is able to do, he may be imprisoned until he performs it. Such a provision gave authority to the court in the prineipal case. The court said: "Where the statute is silent as to the remedy, the court has inherent power to enforce its judgments or decrees and orders according to its equity powers. The silence of the statute in this respect does not take away any power lodged in the court by its equity jurisdiction. 3 Pom. Eq. Jur. §1318; 2 Daniell, Ch. Prac. *1042 *et seq.*; 2 Bish. Mar. Div. & Sep. §1114; 1 Enc. Pl. & Prac. pp. 434, 437; O'Callaghan v. O'Callaghan, 69 Ill. 552. In this state no rule is provided by statute for the enforcement of such decrees, but the rule of attachment has been generally followed in the practice and approved by this court. In the case of State v. Smith, 17 Wash. 430., 50 Pac. Rep. 52, where the plaintiff was allowed by final decree $25 per month 'as alimony and for the support of said children,' this court said: 'It is the duty of courts to enforce their orders, and when it comes to their knowledge that such orders are not obeyed they should require and enforce such obedience by punishment for contempt.' In the case of State v. Ditmar, 19 Wash. 324, 53 Pac. Rep. 350, this court said: 'It will be conceded that, if it is out of the power of the party against whom the decree is entered to comply with its conditions, and this showing is made to the court, he has purged himself of the contempt. But the case cited is authority on the proposition that the remedies are cumulative, and that where other remedies exist, and the party has contumaciously refused to obey the decree of the court, he may be punished for contempt.' We are not disposed to depart from the rule in these cases. The case entitled *In re* Van Alstine, 21 Wash. 194, 57 Pac. Rep. 348, is cited as announcing a different rule. In that case, however, the court declared that the decree was for money, 'a decree analogous to a money judgment at law which may be enforced by process against property,' and for that reason it was held that the court was without power to require the money to be paid into court and enforce such payment by imprisonment."

RELEASE—VALIDITY OF CONTRACTS BY NEXT OF KIN RELEASING COMMON CARRIERS FROM LIABILITY FOR NEGLIGENCE.—In Tarbell v. Rutland R. R., decided by the Supreme Court of Vermont in December, 1901 (51 Atl. Rep. 6),

it was held that a contract between a railroad company and the next of kin of an employee, whereby the latter released the railroad from all damages that might accrue by reason of its negligence, was void as against public policy. It appeared that the plaintiff, as next of kin of a proposed employee, before his employment by the defendants and in consideration that it would employ him, entered into a written agreement with the defendant by which the plaintiff released and discharged it from all damages that might accrue to the plaintiff as next of kin, by reason of the defendant's negligence during the employment. The suit was brought by the plaintiff as administrator of the employee for damages for negligence causing his death. It was contended on behalf of the defendant that, conceding that a contract for immunity from liability for negligence between itself and an employee would not be upheld, the contract in question, being with the next of kin of the employee, is not objectionable. The court had little difficulty in demonstrating that the same considerations that have led the federal courts and the courts of many of the states, including Vermont, to hold contracts with an employee himself contrary to public policy, apply with equal force to a contract of the kind under consideration.

The question is suggested whether any distinction between the two kinds of contract could be made in such a state as New York, where contracts by employees or passengers themselves, exonerating a carrier from liability for negligence, if sufficiently definite and specific in their terms, are upheld. Kenney v. Railway Co., 125 N. Y. 422, and cases cited. The better view would seem to be that there is no logical distinction between the two classes of cases. It might be said that a contract by a next of kin of a proposed employee is contingent. He agrees that if the employee subsequently be killed, and that he (the contracting party) be the next of kin at the time of the death, he will not make any claim. Nevertheless, according to the usual analogies of the law, there is no objection to a person releasing in advance a benefit or right which contingently may accrue to him. On the question of consideration, the position of the company is that it made a contract of employment which presumably it would not have made unless, as one of the elements of consideration moving to it, the next of kin executed the release. The contract is analogous to one of suretyship which is enforcible though no consideration moves to the surety.

Another somewhat technical ground may be suggested for a distinction. Actions for damages for death are statutory, the remedy being founded upon enactments modeled upon Lord Campbell's act in England. There are cases in some of the states holding that where by statute special precautions for the safety of passengers, employees and the public are prescribed, and a cause of action expressly granted for their neglect, such a law constitutes a definite expression of public policy which, in any event, would preclude the recognition of a contract of exemption from liability. See Starr v. Great Northern Railway (Minn.), 69 N. W. Rep. 632. It might be argued that the grant by statute of a right of recovery to, or in favor of, the next of kin of a decedent is such an explicit declaration of public policy that it could not be contracted against, even though contracts of immunity may be upheld as against living persons who sue upon common-law rights. We own that we do not consider this point a very strong one.—*New York Law Journal.*

ENFORCEMENT OF CONTRACT VALID WHERE MADE, BUT CONTRARY TO THE PUBLIC POLICY OF THE STATE OF THE FORUM.

Two recent cases, one in Missouri, the other in Wisconsin, exhibit a peculiar difference of opinion on an exactly similar state of facts. In the Missouri case, Edwards Brokerage Co. v. Stevenson,[1] the defendant, in St. Louis, authorized the plaintiff, a brokerage company, to purchase stocks for him on margin. The plaintiff purchased them in New York, but the market falling they were afterwards sold out and the plaintiff sued for money advanced and commissions. The transaction was illegal under the provisions of the Missouri statute concerning option sales. It did not appear, however, that such contracts were illegal by the law of New York, and on the ground that it was a New York contract which was sued on and not a Missouri contract the plaintiff was held entitled to recover. "The plaintiff," said Burgess, J., in a very brief opinion, "in its purchase of the stock, was not restricted to any particular market, and, having purchased and paid for it in the city of New York, it was to all intents and purposes a contract of that state."

In the Wisconsin case, Bartlett v. Collins,[2] the action was by brokers to recover for moneys advanced and services performed in the purchase of grain for the defendant on the Chicago Board of Trade. Both parties, as in the Missouri case, were residents of the same state (Wisconsin). The defense, as in the Missouri case, was that the transaction was in violation of the Wisconsin statute as to gaming. This was admitted, but it was insisted by the plaintiffs that the grain having been purchased in Chicago, the contract was an Illinois contract and was not in violation of any law of Illinois. But the court properly held that it was a Wisconsin contract and, therefore, to be governed by the law of Wisconsin." "The contract in question," said Winslow, J., "is the brokerage contract by which the defendant employed plaintiffs to sell wheat for him in Chicago,

[1] 160 Mo.; 61 S. W. Rep. 617.
[2] 85 N. W. Rep. 703.

and agreed to pay the plaintiffs their commission for such service and indemnify them against loss. Both parties lived in Wisconsin, and the contract was made here. It is true that one act under the contract was to take place in Illinois, but all other acts, including the payment by the principal of all obligations incurred to his agents, were manifestly to take place in Wisconsin. Under the rules stated, it seems certain that it should be held to be governed by the law of Wisconsin."

The conclusion of the Missouri court is plainly untenable. It is an example of those anomalous and confusing judicial decisions which in many questions of the law beset the student and render the endeavor to reduce the conclusions of the courts to scientific principles utterly discouraging. The Missouri court entirely misapprehends the nature of the action, treating it as though it were an action by a third person against the principal on a contract made by the agent. But it was nothing of the kind; it was a suit on the contract of agency for services rendered and money expended for the principal's benefit and at his request. A simple illustration will demonstrate the error of the court. A and B are both residents in St. Louis. A enters into a contract with B in St. Louis authorizing him to purchase 100 horses for him of a certain description. The contract provides for the payment by A of a certain commission to B and his expenses. Nothing is said about where the horses are to be bought. B starts out to look for the horses and purchases twenty in Missouri, twenty in Illinois, twenty in Louisiana, twenty in California and twenty in Canada. B subsequently sues A on the contract for his commission and expenses. According to the Missouri doctrine the right to recover his commission and expenses on twenty horses would have to be determined by the law of Missouri and on the other eighty by the laws respectively of Illinois, Louisiana, California and Canada. If the suit were by the seller of the horses in another state against A, the principal, then the law of the state where the sale was made would doubtless be relevant. But to apply this rule to an action on the contract of agency, is to lose sight of the difference between the contractual relation which exists when A engages B to represent him in a negotiation with C and the contractual relation which exists when B in the execution of his authority enters into an agreement with C on behalf of A.[3]

The Missouri and Wisconsin cases are at variance on another point, *i. e.*, to what extent will the general rule that a contract good where made is good everywhere, be affected by the public policy expressed in the statutes of the state wherein the contract is sought to be enforced.

In Bartlett v. Collins, the Supreme Court of Wisconsin declared that even were it true that the contract in question was an Illinois contract, yet it would not be enforced by the courts of Wisconsin, because it is a universal principle that the courts of no state will hold valid any contract which is injurious to the public rights of its people, offends their morals, contravenes their policy, or violates a public law.

The Supreme Court of Missouri, in Edwards Brokerage Co. v. Stevenson, did not even notice this point, though called to its attention both in printed and oral argument.[4] The Missouri court not only went astray on the question of the place of the contract as already shown, but seemed to think that the rule that a contract, so far as its validity is concerned, is to be construed according to the law of the place where it is made and not of the place where it is sought to be enforced, was subject to no exception or qualification. The truth is that there are several well settled exceptions to the rule:

1. The first exception is where the contract is contrary to good morals.[5] In Westlake's Pri-

[3] See *Re* Swift, 105 Fed. Rep. 493;

[4] It is a question which had not before been presented to or decided by the Supreme Court of Missouri, nor in the intermediate appellate court has the precise point been ruled upon. In Kerwin v. Doran, 29 Mo. App. 407 (1888), a contract had been made in Illinois for the sale of liquors to a saloon keeper in Iowa. Suit being brought on the contract in Missouri, it was urged that as the object of the contract was to violate the prohibition law of Iowa, it would not be enforced, but Phillips, J., said: "There can be no question, but if this action had been brought in the courts of Iowa, it would fail because the contract was in contravention of the local policy and statutes of that state. But this contract was made in the state of Illinois. It was not contrary to public morals as applied to the administration of law. Neither was it *malum prohibitum* by any statute or law of Illinois, nor repugnant to its internal policy, and this is likewise true of the *forum* in which the action is brought (Missouri). And the judge pointed out that in every instance in the books where the act done by the parties beyond the jurisdiction of the state or nation, though valid in the state where the contract was made, was held to defeat the contract, the action was brought in the jurisdiction of the subject's residence, the local policy of whose laws the contract was designed to violate. Said v. Stromberg, 55 Mo. App. 439, simply decides that the Missouri statutes in regard to labor on Sunday have no extra-territorial effect, and the question as to the policy of our Sunday law is not discussed. In Hatch v. Hanson, 46 Mo. App. 323, it was held that an action could be maintained in this state for the proceeds of a lottery ticket collected by the defendant, the plaintiff claiming a share in it. The court held that even if the original transaction between the parties, *i. e.*, that they should contribute a certain sum of money, buy tickets and share in its winning) was so tainted with illegality that it could not be enforced in our courts, yet as the agreement was executed and the money received by the defendant he could not plead the illegality to protect himself against the plaintiff's claim for whose use a portion of the money had been collected. But since the decision in Roselle v. Farmers' Bank, 141 Mo. 44, this case is not law.

[5] Desentrey v. De Laistra (Md.), 2 H. & J. 191;

vate International Law,[6] it is said: "Where a contract conflicts with what are deemed in England to be essential, public or moral interests, it cannot be enforced here, notwithstanding that it may have been valid by its proper law." Mr. Dicey who, in his great work on the Conflict of Laws, has reduced many of the principles to definite rules, thus states the English law on the subject: "A contract (whether lawful by its proper law or not), is invalid if it or the enforcement thereof is opposed to English interests of state, or to the policy of the English law, or to the moral rules upheld by English law."[7]

In many countries, it was said in an old case, a contract may be maintained by a courtesan for the price of her prostitution; and one may suppose an action to be brought here upon such a contract which arose in such a country; but that would never be allowed in this country.[8]

In a very recent case in the federal court it was ruled that a marriage between uncle and niece, celebrated in Russia, though lawful in that country, will not be recognized in Pennsylvania, the court saying: "Whatever may be the standard of conduct in another country, the moral sense of this community would undoubtedly be shocked at the spectacle of an uncle and niece living together as husband and wife; and I am, of course, bound to regard the standard that prevails here, and to see that such an objectionable example is not presented to the public."[9]

2. The second exception is where the state or its citizens would be injured by enforcing the contract in its courts. This exception is recognized in a multitude of cases.[10] In one of the most recent[11] it was admitted that a Missouri building association had loaned money in Illinois at a usurious rate, unless it fell within the statute of Illinois providing that no interest, premiums or fines accruing to a building association shall be deemed usurious, and that the shares of stock in such associations shall be $100 each, payable in periodical installments not to exceed $2 per share. The Missouri association was organized under an act authorizing the issuance of full paid up interest bearing stock, of the par value of $1,000 per share, to be matured when the dividends and sum invested equalled the face value. It was held by the Supreme Court of Illinois that, as this was not authorized by the local statute, the rule of comity did not apply, and the contract would be held usurious, since the building association provided for by the latter statute is not within the spirit and meaning, but is opposed to the idea of such an association as protected by the local statute. Said the court: "Under our statutes, and under the general rule of comity existing between states, we will allow to foreign corporations a standing in our courts to enforce the valid contracts they may have made with our citizens, and all valid liens against property situated in this State. But that rule of comity does not require that we should allow foreign corporations to enforce contracts here if such enforcement would be in conflict with our laws, and, being thus in conflict, the enforcement whereof would work against our own citizens, and give to the citizens of another state an advantage which the resident has not."

3. The third exception is where the contract violates the positive legislation of the State, *i. e.*, is contrary to its constitution or statutes.[12]

The cases under this head are usually connected with those under the next exception, for the reason that the public policy of the State is so frequently expressed in the legislation of the state.

In Watson v. Murray,[13] parties who had ob-

Lawson, Contr. § 347, p. 366; Dicey, Confl. Laws, 558, Rule 148, Ex. 1; Leroy v. Crowinshield, 2 Mason, 157; Ogden v. Saunders, 12 Wheat. 259; Armstrong v. Toler, 11 Wheat. 258; Burcher v. Lawson, Cas. Temp. Hard. 84, 89, 91; Walker v. Perkins, 3 Burr. 1568; Bennington v. Wallis, 4 B. & Ald. 650; Loyd v. Johnson, 1 B. & P. 340; Levy v. Kentucky Distillery, 9 Ky. L. R. 103; Brown v. Am. Co., 31 Fed. Rep. 516.

[6] § 204.

[7] Dicey, Confl. Laws, 558, Rule 148, Ex. 1.

[8] Robinson v. Bland, 2 Burr. 1084.

[9] United States v. Rodgers, 109 Fed. Rep. 886.

[10] Story, Confl. L. § 327; Greenwood v. Curtis, 6 Mass. 358; Schlee v. Guckenheimer (Ill.), 54 N. E. Rep. 302; Faulker v. Hyman, 142 Mass. 53; Hall v. Spear, 50 N. H. 253; Fisher v. Ford, 63 N. H. 514; Rowland v. Old Dominion Assn. (N. Car.), 18 S. E. Rep. 765; Randall v. Nat. Prot. Assn., 45 Neb. 876, 62 N. W. Rep. 257; Dicey, Confl. L., 558, Rule 148, Ex. 1; Leroy v. Crowinshield, 2 Mason, 15; Merchants' Bk. v. Spalding, 12 Barb. 302; Woodward v. Roane, 23 Ark. 525; Ivey v. Lalland, 42 Miss. 444; Whiston v. Stodder, 8 Mart. (La.) 95; Saul v. His Creditors, 5 Mart. (N. S.) 569; Arago v. Currell, 1 La. 528; Bentley v. Whittemore, 19 N. J. 462; Cole v. Lucas, 2 La. Ann. 953; Many v. Brown, 5 La. Ann. 269; Tatum v. Wright, 7 La. Ann. 358; Groves v. Nutt, 13 La. Ann. 117; Hughes v. Klugender, 14 La. Ann. 52; Prentiss v. Savage, 13 Mass. 20; Ingraham v. Geyer, 13 Mass. 146; Tappan v. Poor, 15 Mass. 419; West Cambridge v. Lexington, 1 Pick. 506; Martin v. Hill, 12 Barb. 631; Crosby v. Houston, 1 Tex. 203; Andrews v. Pond, 13 Pet. 65, 78; Tennett v. Bartlett, 21 Vt. 189; Forbes v. Cochrane, 2 B. & C. 448, 471; Thurston v. Rosenfield, 42 Mo. 474; Galliams v. Pune, 18 La. Ann. 10; Walters v. Whitlock, 9 Fla. 86; McLean v. Hardin, 3 Jones (Eq.), 294; Gardner v. Lewis, 7 Gill, 378; Gibson v. Sublette, 4 Ky. L. Rep. 730.

[11] Rhodes v. Mo. Savings Co. (Ill.), 50 N. E. Rep. 998. See Shannon v. Georgia Bldg. Assn. (Miss.), 30 South. Rep. 51.

[12] Ivey v. Lalland, 42 Miss. 444; Mahomer v. Hooe, 9 S. & M. 247; Hinds v. Brazealle, 2 How. 827; Saul v. His Creditors, 5 Mart. (N. S.) 569; Pittsburg's R. Co.'s Appeal (Pa.), 4 Atl. Rep. 385; Swann v. Swann, 21 Fed. Rep. 301; Faulkner v. Hyman, 142 Mass. 53; Hill v. Spear, 50 N. H. 253; Fisher v. Ford, 63 N. H. 514; Schlee v. Guckenheimer (Ill.), 54 N. E. Rep. 302; Rowland v. Old Dominion Assn. (N. Car.), 18 S. E. Rep. 965; Randall v. Nat. Prot. Assn., 43 Neb. 876, 62 N. W. Rep. 283; Mumford v. Canty, 50 Ill. 370; Strecker v. Pinkham, 35 Ga. 176; Parsons v. Trask, 7 Gray, 473; Donovan v. Pitcher, 53 Ala. 411.

[13] 23 N. J. Eq. 257.

tained lottery franchises from the states of Missouri, Virginia, Kentucky and Louisiana, had entered into a partnership agreement for the conduct of the lotteries and the division of the profits. One of them filed a bill in a New Jersey court for the dissolution of the partnership and the sale and distribution of the assets. The bill was dismissed, the court saying that "assuming that all the contracts and transactions involved in it occurred in states where they were tolerated by law, my opinion is that this court will not undertake to enforce and administer them." The public policy of the state towards lotteries was shown by the statute of New Jersey, which made the selling of lottery tickets a misdemeanor, declared lotteries public nuisances, and otherwise penalized the carrying on of such enterprises within its borders. By a statute of Massachusetts an agreement to make a will "is not binding" unless in writing. A woman of Massachusetts, being in Maine, orally promised the plaintiff that if she would leave Maine and take care of her during her life she would leave her all her property at her death. The plaintiff accepted the proposal, went with her to Massachusetts, performed her part of the agreement, and at her death sued her executor on the promise. It was shown that the oral contract was good in Maine, but the court of Massachusetts refused to enforce it. "The statute," says Holmes, J., "embodies a fundamental policy. The ground is the prevention of fraud and perjury, which are deemed likely to be practiced without this safeguard. * * * If the policy of Massachusetts makes void an oral contract of this sort made within the state, the same policy forbids that Massachusetts' testators should be sued here upon such contract without written evidence wherever it is made.[14]

4. The next exception is where the contract is one violating the public policy of the state where the action is brought.[15]

A contract, says Dicey,[16] is against the policy of English law when it is against the morality upheld by English law. Many illustrations of what this means are to be found in the judicial reports. In the leading English case of Brook v. Brook,[16a] a widower and the sister of his deceased wife, both domiciled in England, while on a temporary visit to Denmark were married. The marriage was valid according to the law of Denmark, but was invalid by the law of England which prohibited the marriage of a man with the sister of a deceased wife. But the house of lords held that it would not be recognized by the English court, such marriages being contrary to the public policy of England. The public policy of the former slave states of the union on the question of mixed marriages follows these principles. In these states marriages between white and colored people are prohibited. But in most of the northern states and in all parts of Europe such marriages are perfectly legal. Nevertheless such marriages will not be recognized in these states; and such persons, indicted for living together in adultery in one of these states, cannot plead that they were legally married in another state or country.[17] In Hope v. Hope,[18] husband and wife living in France made a contract in that country which provided for two things which by the law of England were illegal, viz.: the collusive conduct of a divorce suit, and the abandonment by the husband of the custody of his children. The English courts refused to enforce any part of it, holding that if a court of one country is called upon to enforce a contract entered into in another it is not enough that the contract should be valid according to the law of the latter, for if any part of the contract is inconsistent with the law and the policy of the former, the contract will not be enforced, even as to another part of it which may not be open to this objection, and may be the only part remaining to be performed. In Grell v. Levy,[19] an agreement was made in France between an English attorney and a French subject, that the attorney should recover a debt for the client in England and keep half of it for his fee. Such a contract was lawful by the law of France, which knows nothing of the English law of champerty. It was held that the contract, being opposed to the policy of the English law, could not be enforced in the English courts. In Rousillon v. Rousillon,[20] the parties had entered into an agreement in France in restraint of trade. The agreement was perfectly valid in France, where the common-law doctrine regarding such contracts as against public policy is unknown. It was held that the agreement, though good where made, would not be enforced by an English court. "It has been insisted," said the court, Fry, J., "that even if the contract was void by the law of England as against public policy, yet inasmuch as the contract was made in France it must be good here, because the law of France knows no such principle as that by which unreasonable contracts in restraint of trade are held to be void in this country. It appears to me, however, plain on general principles, that this court will not enforce a contract against the

[14] Emery v. Burbank, 163 Mass. 323.

[15] Welling v. Eastern Bldg. Assn. (S. Car.), 34 S. E. Rep. 470; Kimberly v. Clark Co., 89 Wis. 545, 62 N. W. Rep. 526; Westlake, Priv. Int. L. § 204; Pollock, Cont. p. 342; Ogden v. Saunders, 12 Wheat. 257; Bliss v. Brannard, 41 N. H. 261; Davis v. Brunson, 6 Ind. 410; Smith v. Godfrey, 28 N. H. 617; Kanaga v. Taylor, 7 Ohio St. 134; Frazer v. Fredericks, 24 N. J. L. 162; Pittsburg's R. Co.'s Appeal (Pa.), 4 Atl. Rep. 385; Thrasher v. Everett, 3 G. & J. 334; Phinney v. Baldwin, 16 Ill. 62; Balt., etc. R. Co. v. Glenn, 28 Md. 287; Mumford v. Canty, 50 Ill. 370; Gooch v. Faucette, 122 N. Car. 270.

[16] Confl. L. p. 558.

[16a] 9 H. L. Cas. 193.

[17] Kinney v. Com., 30 Gratt. 858; State v. Kennedy, 76 N. Car. 251; State v. Bell, 7 Baxt. 12; Newman v. Kimbrough, 59 S. W. Rep. 1061.

[18] 8 De G., M. & G. 731.

[19] 16 C. B. (N. S.) 73.

[20] 14 Ch. Div. 351.

public policy of this country wherever it may be made. It seems to me almost absurd to suppose that the courts of this country should enforce a contract which they consider to be against public policy, simply because it happens to have been made somewhere else." In Union Locomotive Co. v. Erie R. Co.,[21] a contract between a railroad company in New Jersey and certain individuals gave the latter the exclusive right of transporting certain kinds of freight over the railroad. The contract had been made in New York;[22] and had been sustained by the courts of that state.[23] But the action being brought for the breach of some of its provisions in New Jersey, the Supreme Court of New Jersey held that the contract was void because against the public policy of New Jersey; and, this being so, it would not be enforced though valid where made. "A contract," said Depue, J., "valid elsewhere will not be enforced if it is condemned by positive law or is inconsistent with the public policy of the country, the aid of whose tribunals is invoked for the purpose of giving it effect." A promissory note made in Tennessee provided for the payment of attorney's fees in case of suit. Such an agreement is valid in that state; but in Kentucky is void "as contrary to the policy of our laws which prescribe the amount of attorney's fees taxed against the unsuccessful litigant, and an agreement to pay penalties tending to oppression of the debtor and to encourage litigation."[24] Suit being brought in Kentucky on such a note, it was held that the provision for attorney's fees would not be enforced. "It is sometimes difficult," said Lewis, J., "to determine whether a particular case is within the general doctrine (*e. g.*, that a contract good where made is good everywhere), or fairly an exception to it. But it is a safe position that comity should not nor does require a contract made in one state to be enforced by the courts of another state that treats a similar one as absolutely void."[25] The same conclusion was reached in Oregon in regard to a note made in Kansas but attempted to be enforced in Oregon;[26] and in a Nebraska case where the note was made in Iowa.[27] In Pittsburg R. Co.'s Appeal,[28] a contract was made in New York for the issue of bonds and the creation of a mortgage by a corporation. It was good in New York but was in contravention of the provision in the Pennsylvania constitution against fictitious issue of corporate stock. The Supreme Court of Pennsylvania refused to enforce it because it was repugnant to the public policy of the state. In Varnum v. Camp,[29] a debtor had made (in New York) an assignment for the benefit of creditors, with preferences to a certain creditor. Such an assignment was valid by the law of York. By statute in New Jersey assignments were declared fraudulent and void whenever, by their terms, a preference to any creditor or creditors was created. The validity of the assignment came before the New Jersey court; it was held illegal and void, because contrary to the statute of that state, which declared the public policy of the state as to preferences by debtors.[30] In Dearing v. McKinnon Co.,[31] decided by the Court of Appeals in New York in 1900, it was laid down that the rule that transfers of property valid under the *lex domicilii* will be enforced by the courts of a foreign state, does not apply where the domiciliary law conflicts with the policy of such state. And therefore a chattel mortgage given in another state though valid there, which would be void as to creditors if made in New York, does not pass title to property in New York as against a resident who has attached the property, and will not be enforced. "Judicial comity," said Vann, J., "does not require us to enforce any clause of the instrument which, even if valid under the *lex domicilii*, conflicts with the policy of our state relating to property within its borders, or impairs the rights or remedies of domestic creditors. A transfer in another state, although valid there, which would be void as to creditors if made here, does not confer title to personal property situated here that is good as against a resident of this state armed with legal process to collect a debt. To this extent, in nearly all jurisdictions, the rule of comity yields to the policy of the state with reference to the collection of debts due to its own citizens out of property within its boundaries and protected by its laws." In Oscanyon v. Arms Co.,[32] the plaintiff, an officer of the Turkish government, had made a contract with the defendant, a manufacturer of fire-arms, under which he was to receive a commission on such as he could induce that government to purchase. In a suit on the contract, it was held by the Supreme Court of the United States that, even were the contract made in Turkey, and valid there, the Turkish government being willing that its officers should receive bribes for official action, yet, contracts of this kind being against the public policy of this country, they would not be enforced in our courts.

The American rule regarding contracts limiting the liability of a carrier of goods is a good illustration of what is called public policy law. The rule is, in effect, that a contract between carrier and customer that the carrier shall not be liable for the goods in his charge when they are

[21] 37 N. J. L. 23.
[22] See 6 Vroom. 410, where it is set out in full.
[23] See 37 N. J. L. 25.
[24] Witherspoon v. Musselman, 14 Bush, 214.
[25] Clark v. Tanner (Ky.), 38 S. W. Rep. 11; Rogers v. Raines (Ky.), 38 S. W. Rep. 484.
[26] Com. Nat. Bk. v. Davidson (Oreg.), 22 Pac. Rep. 517.
[27] Hallam v. Tellerin, 75 N. W. Rep. 560.
[28] (Pa.), 4 Atl. Rep. 385.
[29] 13 N. J. L. 326; Moore v. Bonwell, 31 N. J. L. 90.
[30] The same principle has been recognized in Missouri in Thurston v. Rosenfield, 45 Mo. 474, and in other states. Strecker v. Pinkham, 35 Ga. 176.
[31] 58 N. E. Rep. 773.
[32] 13 Otto, 261.

negligently destroyed, lost or damaged, is void, on the ground of public policy. All decisions put the illegality of such contracts on that ground. There is no such public policy in England. Though the rule in the early common law was even more strict, yet for more than a century such contracts have been held valid by the courts of Great Britain.[33] In a number of cases in the federal courts stipulations of the kind contained in bills of lading made in England have been held no protection in our tribunals, on the ground that contracts against the public policy of this country cannot be upheld or enforced in our courts, wheresoever made.[34]

In one of these cases the court says: "Such a provision is unlawful here. If its unlawfulness arose from conflict with our statutes, or violation of our sense of good morals, we certainly would not enforce it. Judicial decisions are, however, as effectual in establishing the law as the enactment of statutes. The controlling fact is the unlawfulness of such contracts here; that they are forbidden by our laws. It is unimportant whether the laws rest upon such decisions or upon statute. We hold them to be in conflict with the public interests, and, therefore, in violation of sound public policy. Declaring them immoral would add nothing to the reason for holding them unlawful. * * * The stipulation that the parties shall be subject to the laws of England is unimportant, as it adds nothing to the implication which would arise in its absence. The ship bore the English flag, and the laws of Germany, where the contract was made, as well as those of England, sustain such provisions. That the intent of the parties in this regard is thus *expressed* is, therefore, immaterial. In every instance where the courts have declared such stipulations void, it has, of course, been against the express agreement of the parties. We have determined that such contracts are harmful and wrong; that they tend to encourage negligence and justify oppression; that they affect injuriously not only the immediate parties, but the public at large; and that they are therefore unlawful. Why, then, should we lend our aid for the enforcement of such a contract because it is made abroad, instead of at home? I can see no sound reason why we should. Of course, it is true that contracts are enforceable, generally, according to the law of the place where they are made, or are to be executed, or such other place as the parties may stipulate, or circumstances may show they contemplated. Where, however, their provisions conflict with justice and sound public policy, as declared by the laws of jurisdiction where their enforcement is sought, it is otherwise."[35]

In Chicago & N. Co. v. Gardener,[36] the Supreme Court of Nebraska held that a limitation of the liability of a common carrier, contained in a shipping contract, would not be recognized or enforced in that state, though valid in the state where made (Illinois) as such attempted restriction of liability is illegal, and contrary to the public policy of Nebraska.

In Pope v. Hanke,[37] the plaintiff sued on promissory notes for over $8,000 made in St. Louis, Mo., payable to the order of the D. P. Grier Grain Co., and indorsed by the payee to plaintiff. The defense was that the notes were given in settlement of an option deal, and were void by the statute of Illinois. Reply that they were made in Missouri whose statutes do not make notes of this character void if in the hands of a *bona fide* holder for value, and that the plaintiff was such. The plaintiff introduced at the trial the Missouri statute, and the case of Crawford v. Spencer,[38] holding that under the law of Missouri the *bona fide* holder of such a note could recover. The Supreme Court of Illinois held that under the statutes of Illinois notes based on gambling contracts of this kind were absolutely void, even in the hands of an innocent holder, and it made no matter that they were good by the law of Missouri where they were made and indorsed. "The enforcement of such foreign law," said the court, "would contravene the criminal code of this state; and would be in opposition to its public policy, and to the express prohibition of its statutory enactment, and would be prejudicial to the interests of its people."

In Flagg v. Baldwin[39] will be found a case strikingly like the Missouri case of Edwards Brokerage Co. v. Stevenson and the Wisconsin case of Bartlett v. Collins. Here a contract was made in New York whose object was the speculating in stocks upon margins. Suit was brought in New Jersey. The contract was plainly (as in the Missouri case) against the statute of New Jersey as to gaming contracts. There was no evidence as to the law of New York on the subject (as in the Missouri case), and the court (as in the Missouri case) held that the common law must be presumed to be in force on the subject in New York, and (as in the Missouri case) that by the common law the contract was perfectly legal. Finally (as in the Missouri case), the court gave judgment for the plaintiff. But on appeal to the court of errors and appeals the question was presented to that court whether such a contract, which had it been made in New Jersey would

[33] Lawson, Bail. § 136.

[34] The Guild Hall, 58 Fed. Rep. 799; Lewiston v. Nat. Steam. Co., 56 Fed. Rep. 602; The Iowa, 50 Fed. Rep. 561; The Hugo, 57 Fed. Rep. 403; The Brantford City, 29 Fed. Rep. 395; Botany Worsted Mills Co. v. Knott, 82 Fed. Rep. 471; The Kensington, 94 Fed. Rep. 885; The Energia, 56 Fed. Rep. 124; The New England, 110 Fed. Rep. 415. *Contra:* Forepaugh v. R. Co., 128 Pa. St. 217, by a divided court; Fonseca v. Cunard Co., 153 Mass. 553.

[35] The Glenmaris, 69 Fed. Rep. 472.

[36] 70 N. W. Rep. 508.

[37] 155 Ill. 617, 40 N. E. Rep. 837.

[38] 92 Mo. 498.

[39] 38 N. J. Eq. 219. See also Violett v. Marigold (Miss.), 27 South. Rep. 875; Lemonius v. Mayer, 71 Miss. 514, almost similar cases.

have been void and unenforceable, would be enforced by the court, simply because it was made in another state, according to whose laws it was presumptively valid. And this question the court answered in the negative: "An almost complete agreement exists upon the proposition," said Magee, J., "that a contract valid where made will not be enforced by the courts of another country, if in doing so they must violate the plain public policy of the country whose jurisdiction is invoked to enforce it, or if its enforcement would be injurious to its interest or conflict with the operation of the public laws of that country. * * * We are brought, then, to the question whether our law against gaming is such a public law, and establishes such a public policy as to require us to refuse to enforce foreign contracts in conflict with it, in a case like that under consideration. I think this question must be answered in the affirmative. * * * In my judgment our law against gaming is of such a character, and is designed for the prevention of vice producing injury so widespread in its effect, the policy evinced thereby is of such public interest that comity does not require us to here enforce a contract, which by that law is adjudged as unlawful, and so prohibited." Flagg v. Baldwin has been recently affirmed by the highest court of New Jersey in a case in which it is held that a New Jersey court will not aid judgment creditors to enforce a judgment for debts growing out of wagering contracts, although the contracts were made in another state, where they were legal, and although the defendants in the bill were non-residents of New Jersey, and have not, in their answer, set up the character of the contracts as a defense. The court said that its refusal to act does not rest upon regard for the defendant. It is based on the unwillingness of the court to use the powers which were granted for the furtherance of lawful ends in aiding schemes the nature of which is condemned by the public policy of the state.[40] In North Carolina[41] a promissory note was given in Virginia to pay a bet on a horse race run in that state. The note was valid in Virginia. The note was held not enforceable in North Carolina where betting on horse races is contrary to public policy.

The effect of a conflict between a state and a federal law is illustrated in two interesting cases. In Liverpool Steam Co. v. Phœnix Ins. Co.,[42] a contract had been made in New York for the carrying of goods by water to England; and it exempted the carrier from liability for any negligent loss or damage to the goods. Such a stipulation was valid in New York. But the suit being brought in the federal court, the New York law was not permitted to interfere with the federal law on this subject—a judge-made law founded on public policy—and the contract was held void. In Wight v. Rindskopf,[43] the plaintiff brought a suit in Wisconsin for legal services rendered the defendant. The proof was that the object of the service was the compounding of a crime, defendant and others being at the time under indictment in the federal courts for violation of the United States revenue laws. The court held that the agreement under which the service was rendered was void for illegality, such contracts being contrary to public policy of the state. On rehearing it was brought to the attention of the court that the federal statutes expressly authorize such compromises with the government, with the consent of the secretary of the treasury and the attorney general. The supreme court expressed the greatest astonishment that such a law was in existence. "We were educated," said Ryan, C. J., "politically and professionally in too high a reverence for federal authority in its sphere to have thought it possible for such a provision in a federal statute. The court admitted that it might be binding upon the federal judges in actions in their courts, but refused to give it any recognition in the Wisconsin court. "We could no more enforce contracts compounding or tending to compound crime coming from the federal jurisdiction than contracts of polygamy from the jurisdiction of Utah or Turkey." A contract for the purchase of goods is made in Maryland by a married woman; it is valid there. In North Carolina the common-law liability of married women to make contracts still exists. The contract will not be enforced in North Carolina because contrary to the policy of the state as to the power of married women.[44] Mr. Justice Gray, in Milliken v. Pratt,[45] admits that in a state where the common law prevailed in full force, as to married woman—the common law which deemed the *feme sole* incapable of binding herself by any contract whatever—such an incapacity would be so fixed by the public policy of the state, that it would not yield to the law of another State in which she might undertake to make a contract. But if the state had enlarged her capacity to contract, though not to the extent of other states, this relaxation in itself would show such a change in the public policy on that subject as to make it likely that a contract of any kind made by her in another State and valid according to those laws would be recognized by it. The same principle was recognized in a recent case in New Jersey[46] where it was laid down that the statute of New Jersey that regulates the right of married women to make contracts of suretyship is not a declaration of a public policy that closes the courts of that state to

[40] Minzeshimer v. Doolittle (N. J.), 45 Atl. Rep. 616.

[41] Gooch v. Faucette, 122 N. Car. 270, 29 S. E. Rep. 362.

[42] 129 U. S. 397.

[43] 43 Wis. 344.

[44] Armstrong v. Best, 112 N. Car. 188, and this case has been practically followed in Missouri in Ruhe v. Buck, 124 Mo. 178. See 51 Cent. L. J. 111.

[45] Milliken v. Pratt, 125 Mass. 374.

[46] Thompson v. Taylor, 49 Atl. Rep. 544.

rights of action arising in other jurisdictions, where the law is different.[47]

Several states having made it unlawful for foreign insurance companies to make contracts of insurance in their jurisdiction, unless the company have performed certain conditions precedent to their doing business there, to evade these laws, unlicensed foreign companies have made contracts in their own states on property located in the other states. But when such contracts are sought to be enforced there the courts have refused relief. In support of the contract the plaintiff has argued: We know that the laws of your state are designed to prevent our insuring property in your state, but we have done so in a way that does not contravene the letter of your statute, which says that no contract made by unlicensed companies like this company in your state shall be valid. But we have made our contract in another state where we have a right to make contracts of insurance, we have committed no violation of your law for we have done nothing on the soil of your state. True, we have evaded your laws and have made a contract which you sought to prohibit, but we have a right to ask you to enforce it under the doctrine of state comity. But the answer is that the courts of the offended state are not open to you and the rule of comity cannot be envoked in your behalf.[48]

The public policy of a state is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts. But when the legislature speaks upon a subject upon which it has the constitutional power to legislate, public policy is what the statute passed by it enacts.[49] "The only authentic and admissible evidence of the public policy of a state on any given subject are its constitutions, laws and judicial decisions. The public policy of a state of which courts take notice and to which they give effect, must be decided from those sources."[50] Where the state has spoken through its legislature, there is no room for speculation as to what the policy of the state is.[51] The drastic laws prohibiting stock gambling contained in the Missouri statutes are a sufficient indication of the state policy as was admitted by the Supreme Court itself when, speaking of these laws, it said: "The civil statute in regard to gaming plainly defines a public policy on that subject which the courts cannot ignore. The effect of that statute is to set the seal of legislative disapproval on gaming contracts."[52]

Yet public policy was entirely overlooked by this tribunal in its decision in the Missouri case which we have made the text for this article.

JOHN D. LAWSON.

[47] See also Bowles v. Field, 83 Fed. Rep. 886.

[48] Swing v. Munson (Pa.), 43 Atl. Rep. 344; Rose v. Kimberly Co., 89 Wis. 542; Seamans v. Temple Co., 103 Mich. 400, 28 L. R. A. 430.

[49] United States v. Trans-Missouri Freight Assn., 166 U. S. 290, 17 Sup. Ct. Rep. 240.

[50] Swann v. Swann, 21 Fed. Rep. 301.

[51] Mahomer v. Hooe, 9 S. & M. 247.

[52] Rozelle v. Farmers' Bank, 141 Mo. 42.

CONTRACTS—RIGHT OF STATE TO PROHIBIT CONTRACTS FOR FUTURE DELIVERY.

BOOTH v. STATE OF ILLINOIS.

Supreme Court of the United States, March 3, 1902.

A statute invalidating contracts giving an option to sell or buy, at a future time, any grain or other commodity, whether delivery is contemplated or not, is not in violation of any constitutional provision.

MR. JUSTICE HARLAN: By section 130 of the Criminal Code of Illinois it is provided that "whoever contracts to have or give to himself or others the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than ten dollars nor more than one thousand dollars, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void." Rev. Stat. Ill. Crim. Code, § 130.

The defendant was indicted in the Criminal Court of Cook County, Illinois, being charged with violating this statute so far as it related to options to buy grain or other commodities at a future time and where delivery was contemplated.

At the trial, by motions to squash the indictment, in arrest of judgment, and for a new trial, the accused insisted that the statute under which he was prosecuted was repugnant to that clause of the fourteenth amendment of the constitution of the United States declaring that no state shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." This contention was overruled both in the trial court and in the Supreme Court of Illinois. 186 Ill. 43.

It was contended that that agreement was not prohibited by the statute; that the legislature only intended to make such option contracts unlawful as were gambling contracts, that is, option contracts that did not contemplate the delivery or acceptance of any property and which only required a settlement by "differences;" whereas, it was insisted, the option there in question had no element of gambling, being only one that entitles the parties obtaining it to elect on or before a named day whether they would buy the stock described in the agreement.

Taking the statute to mean what the highest court of the state says it means, is it unconstitutional?

It is, however, said that the statute of the state, as interpreted by its highest court, is not directed against gambling contracts relating the selling or buying of grain or other commodities, but against mere options to sell or buy at a future time without any settlement between the parties upon the

basis of differences, and therefore involving no element of gambling. The argument then is, that the statute directly forbids the citizen from pursuing a calling, which, in itself, involves no element of immorality, and therefore by such prohibition it invades his liberty as guaranteed by the supreme law of the land. Does this conclusion follow from the premise stated? It is true that the legislature is without power to forbid or suppress a particular kind of business, where such business, properly and honestly conducted, may not, in itself, be immoral? We think not. A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuits of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law. Mugler v. Kansas, 123 U. S. 623, 661; Minnesota v. Barber, 136 U. S. 313, 320; Brimmer v. Rebman, 138 U. S. 78; Voight v. Wright, 141 U. S. 62.

We cannot say from any facts judicially known to the court, or from the evidence in this case, that the prohibition of options to sell grain at a future time has, in itself, no reasonable relation to the suppression of gambling grain contracts in respect of which the parties contemplate only a settlement on the basis of differences in the contract and market price. Perhaps, the legislature thought that dealings in options to sell or buy at a future time, although not always or necessarily gambling, may have the effect to keep out of the market, while the options lasted, the property which is the subject of the options, and thus assist purchasers to establish, for a time, what are known as "corners," whereby the ordinary and regular sales or exchange of such property, based upon existing prices, may be interfered with and persons who have in fact no grain, and do not care to handle any, enabled to practically control prices. Or, the legislature may have thought that options to sell or buy at a future time were, in their essence, mere speculations in prices and tended to foster a spirit of gambling. In all this the legislature of the state may have been mistaken. If so, the mistake was not such as to justify the conclusion that the statute was a mere cover to destroy a particular kind of business not inherently harmful or immoral. It must be assumed that the legislature was of opinion that an effectual mode to suppress gambling grain contracts was to declare illegal all options to sell or buy at a future time. The court is unable to say that the means employed were not appropriate to the end sought to be attained and which it was competent for the state to accomplish.

The supreme court of the state in this case said: "The practice of gambling on the market price of grain and other commodities is universally recognized as a pernicious evil, and that the suppression of such evil is within the proper exercise of the police power has been too frequently declared to be open to discussion. The evil does not consist in contracts for the purchase or sale of grain to be delivered in the future, in which the delivery and acceptance of the grain so contracted for is *bona fide* contemplated and intended by the parties, but in contracts by which the parties intend to secure, not the article contracted for, but the right or privilege of receiving the difference between the contract price and the market price of the article. The object to be accomplished by the legislation under consideration is the suppression of contracts of the latter character, which are in truth mere wagers as to the future market price of the article or commodity which is the subject-matter of the wager. Clearly a contract which gives to one of the contracting parties a mere privilege to buy corn but does not bind him to accept and pay for it is wanting in the elements of good faith to be found in a contract of purchase and sale where both parties are bound, and offers a more convenient cover and disguise for mere wagers on the price of grain than contracts which create the relation of vendor and vendee. Such contracts are in the nature of wagers, that contracted for being the mere privilege to buy the grain should its market value prove to be greater than the price fixed in the contract for such privilege. The prohibition of the right to enter into contracts which do not contemplate the creation of an obligation on the part of one of the contracting parties to accept and pay for the commodity which is the purported subject-matter of the contract, but only to invest him with the option or privilege to demand, the other contracting party shall deliver him the grain if he desires to purchase it, tends materially to the suppression of the very evil of gambling in grain options which it was the legislative intent to extirpate, for the reason such evil injuriously affected the welfare and safety of the public. The denial of the right to make such contracts tended directly to advance the end the legislature had in view and was not an inappropriate measure of attack on the evil intended to be eradicated. So far as that point is concerned, the act must be deemed a valid law of the land, and as such must be enforced, though it infringe in a degree upon the property rights of citizens. To that extent private right must be deemed secondary to the public good." 186 Ill. 51.

We are unwilling to declare these views of the state court to be wholly without foundation, and therefore cannot adjudge that the legislature of Illinois transcended the limits of constitutional authority when enacting the statute in question.

In reaching this conclusion we have recognized the principle, long established and vital in our constitutional system, that the courts may not strike down an act of legislation as unconstitutional, unless it be plainly and palpably so.

The statute here involved may be unwise. But an unwise enactment is not necessarily, for that reason, invalid. It may be, as suggested by counsel, that the steady, vigorous enforcement of this statute will materially interfere with the handling or moving of vast amounts of grain in the west which are disposed of by contracts or arrangements made in the Board of Trade in Chicago. But those are suggestions for the consideration of the Illinois legislature. The courts have nothing to do with the mere policy of legislation.

The judgment of the Supreme Court of Illinois is affirmed.

Mr. Justice Brewer and Mr. Justice Peckham dissented.

NOTE.—*Police Power—Right of State to Invalidate the Making of Option Contracts.*—How far a state may go, in the exercise of the police power in depriving a citizen of the right guaranteed by the constitution to make any contract which is not in itself harmful, immoral, or injurious to the health, morals or safety of the public is an interesting question. The only reason that can be justly assigned for such a radical exercise of this undefinable power in abridging the right to contract is that given in the case of Magner v. People, 97 Ill. 320, where the court, in upholding the validity of a statute making it a criminal offense to have in one's possession certain kinds of game in certain seasons, says: "This is but one among many instances to be found in the law where acts which in and of themselves alone are harmless enough are condemned because of the facility they otherwise offer for a cover or disguise for the doing of that which is harmful."

It is a well settled rule of constitutional limitation that the rights of individuals to contract cannot be limited by arbitrary legislation which rests on no reason on which it can be defended, since this would subvert the right to enjoy liberty, to acquire property, and to pursue happiness, declared to be inalienable rights by the constitution. Leep v. Railroad, 58 Ark. 407, 25 S. W. Rep. 75; Shaver v. Pennsylvania Co., 71 Fed. Rep. 931; Power v. Shephard, 45 Barb. (N. Y.) 524. In Shaver v. Pennsylvania Co., *supra*, a statute of Ohio provided that all agreements between a railroad or any other company with their employees, whereby such persons agree to waive any right to damages or any other right whatever, should be void. The court held this statute to be in violation of the fourteenth amendment to the constitution of the United States, by depriving the persons affected by it of their liberty of contract, without due process of law. In Leep v. Railroad, *supra*, it was held that a statute attempting to make a corporation, on the discharge of an employee, pay the whole amount of his stipulated wages up to that date, although by this failure to perform his contract he has damaged the corporation, is unconstitutional. The court said: "When the subject of contract is purely and exclusively private, unaffected by any public interest or duty to person, to society, or government, and the parties are capable of contracting, there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract or controlling the terms thereof. In State v. Goodwell, 33 W. Va. 179, the court considered the constitutionality of a statute of West Virginia, which declared "that it shall not be lawful for any person or corporation, engaged in mining or manufacturing to issue for the payment of labor any order or paper notes whatsoever unless the same purports to be redeemable for its face value in lawful money of the United States bearing interest at a legal rate made payable to employee or bearer and redeemable within a period of thirty days by the person or corporation issuing the same." The court held that the statute was unconstitutional and void and said: "It is an encroachment both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him, for the legislature to interfere with the freedom of contract between them, as such interferences hinder the one from working for what he thinks proper, and at the same time prevents the other from employing whom he chooses. A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit; and as incident to this is the right to labor and employ labor, make contracts in respect thereto and to enforce all lawful contracts. The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery, between liberty and oppression."

In regard to option contracts in general there can be no question as to their legality. They are perfectly valid and enforceable contracts. Bigelow v. Benedict, 79 N. Y. 202; Kirkpatrick v. Bonsal, 172 Pa. St. 155; Hanna v. Ingram, 93 Ala. 482; Pieronnet v. Lull, 10 Neb. 457; Lester v. Buel, 49 Ohio St. 240; Godman v. Meixel, 65 Ind. 32. In this last case the rule was well stated as follows: "The validity of option contracts depends upon the mutual intention of the parties. If it is not the intention in making the contract, that any property shall be delivered or paid for, but that the fictitious sale shall be settled on differences, the contract is illegal. But if it is the *bona fide* intention of the seller to deliver, or the buyer to pay, and the option consists merely in the right of delivery within a given time, the contract is valid, and the putting up of margins to cover losses which may accrue from the fluctuation of prices, etc., is legitimate and proper." In Illinois and several other jurisdictions, however, option contracts have been invalidated altogether by placing them in the category of gambling contracts and thus rendering them unenforceable and void. There is much difference of opinion as to the extent of these statutes, and courts hesitated in going to the full extent of its provisions but satisfied themselves on making exception to their operation. The late cases, however, show a tendency to give to these statutes their full meaning. The following are the latest authorities showing the limit and extent of these statutes: Schneider v. Turner, 130 Ill. 28; Richter v. Frank, 41 Fed. Rep. 859; Corcoran v. Coal Co., 138 Ill. 390; Osgood v. Bander, 75 Iowa, 550, 82 Iowa, 171; Preston v. Smith, 156 Ill. 359; Burnett v. Baxter, 64 Ill. App. 544; Minnesota Lumber Co. v. Coal Co., 160 Ill. 85; Schlee v. Guckenheimer, 179 Ill. 593. The case of Schneider v. Turner, *supra*, is the most radical, but at the same time clearest position on this question. Subsequent cases have attempted to *distinguish* it on various frivolous and technical

grounds, which the decision of Justice Harlan in the principal case will do much to discredit. In Schneider v. Turner, the following contract was held within the statute and therefore void: "In consideration of one dollar, receipt of which is hereby acknowledged, I hereby agree to sell to C D 1,786 shares of the capital stock of the North Chicago Street Railway, at $600 per share, if taken on or before the 15th day of December, 1885." It will be observed that this is the ordinary form for a simple option contract, which but for this statute would be perfectly valid and enforceable. But the court held that the statute we have under consideration was not intended to make unlawful merely such contracts as contemplate a settlement by differences,—or, in other words, merely gambling contracts,—as such contracts were illegal and void before such section was ever enacted, but went much further, and made all contracts of options to buy or sell, at a future time, any grain or other commodity, etc., gambling contracts, and void, whether intended to be settled by differences or not. This decision practically overruled many of the earlier decisions and is an unanswerable argument to subsequent cases, which attempt to confine the words of the statute simply to what are inherently gambling transactions. We cannot say that we commend the wisdom of such a statute, but in giving our hearty approval to the case of Schneider v. Turner, we say that it is the height of presumption and an unwarranted usurpation on the part of the courts to construe it into a threadbare condition merely because they doubt its wisdom.

JETSAM AND FLOTSAM.

HOW TO WIN CLIENTS.

Of course, to practice law one must have clients. At times we meet law students and young lawyers who think that success in practice depends upon having an abnormal legal brain crammed with information on all branches of law. The off hand opinions of this brain must be so accurate that its fame will be heralded abroad and clients will come from afar off to bow low and pay it ample retainers. To develop such a brain one must stay in his library and grind, "living like a hermit and working like a horse."

He who starts practice with this view soon finds out that it is entirely wrong, and that clients come from his acquaintances. Much time is lost in finding out that it is well to know the law, it is also well to know the people. Concerning one who started with the right idea we have been sent the following:

"A young man who was studying law in a town of twelve thousand inhabitants was asked by an acquaintance: 'What are you doing now.' 'Reading law and making friends,' was the answer. 'By the time I shall open my office I will know every one in this town—everyone, from the conductors on the street cars and the man who runs the night lunch to the mayor, the judge and the president of the bank. In my opinion it is just as important to prepare yourself to get clients as it is to prepare yourself to draw pleadings. People must know who I am and I must know the people.' Two and a half years later the young lawyer was able to buy out the practice of the oldest lawyer in town."—*Law Student's Helper.*

MR. JUSTICE BREWER ON JURY SYSTEM.

Mr. Justice Brewer in a recent article in the *International Monthly*, takes up the gauntlet for the jury system and makes some pertinent suggestions in regard thereto. He said in part as follows:

"Every one knows that in an important and hard case the struggle of counsel is to secure upon the jury one or more who are friendly to their client, or in sympathy with cause or interest with which he is identified, or who may be easily influenced by appeals to prejudice or sympathy. The intelligent business man, the mechanic and the farmer, too quickly respond to the voice of the judge demanding justice, and hence, if possible, they must be excluded, and the ignorant, easily moved by appeals of counsel secured. Let the rule of unanimity be abolished and the result determined by the conclusions of two thirds or three fourths of the jury, and this struggle after the single helpful juror will largely disappear. And why should it be deemed essential? Neither in legislative halls, among judges, in arbitration proceedings, nor in scarcely any other body called to make a determination, is it the rule. In my judgment, the great objection to the jury system, as it is administered to day, and the one which more than any other threatens its overthrow, is this rule of unanimity. Where it abolished less time would be wasted in impenaling a jury, and a better class of jurors would ordinarily be selected. More than that, the truth would be more certainly determined. How often, in criminal cases, do ten or or twelve jurors yield to the obstinacy of the remaining, and agree on a verdict for a lower degree of crime than they really believe the defendant to be guilty of! And in actions for the recovery of money how often is the amount of the verdict affected by the obstinacy of a single juror!"

"Free the work of the juror from some of the disagreeable annoyances which now too often attend it. He should not be compelled to work more hours than the judge. To shut him up and keep him confined day and night is a crime against society. He is treated to often as an object of suspicion—as though he were probably dishonest, and must be specially shielded from temptation. Why should he be shut up, while the judge is not? A bad man on the bench or in the jury box will surely find ways to be tempted, and few things are more calculated to degrade his office in the sight of the juror, and to bring out all the evil that is in him, then the consciousness that he is an object of suspicion. I have been nearly thirty-seven years on the bench, and take pleasure in recalling that, so far as it was possible, I always relieved the juror from confinement other than such as I myself submitted to; that I endeavored to make him in the discharge of his duties free from suspicion and annoyance. And I have not the slightest reason to doubt that the course thus pursued resulted not merely to the comfort of the juror, but in a better administration of justice."

BOOKS RECEIVED.

Essays in Legal Ethics. By George W. Warvelle, LL. D., Author of a "Treatise on Abstracts of Title," "The Law of Vendor and Purchaser," "Principles of Real Property," etc., Chicago, Callaghan & Company, 1902. Cloth, pp. 234. Price $2.00. Review will follow.

The Negotiable Instruments Law. From the Draft Prepared for the Commissioners on Uniformity of Laws, and Enacted in New York, Massachusetts, Rhode Island, Connecticut, Pennsylvania, District of Columbia, Maryland, Virginia, North Carolina, Tennessee, Florida, Wisconsin, North Dakota, Colorado, Utah, Oregon and Washington. The Full Text of the Law as Enacted, with Copious

Annotations. By John J. Crawford, of the New York Bar, by whom the Statute was drawn. Second Edition. New York: Baker, Voorhis and Company, 1902. Buckram, pp. 173. Price, $2.50. Review will follow.

HUMORS OF THE LAW.

SERVING THE WRIT.

She was a widow, graceful, young,
And oh, so very neat,
With swan-like neck and rosy lips,
And dainty little feet.
An attachment issued from the court—
She'd failed to pay her rent—
And to her lodgings, with the writ,
The constable was sent.

The constable—like all his ilk—
Was a man of tender heart;
Who strove as gently as he could
His business to impart.
He bowed and stammered: "Madam, dear,
An attachment I've for you;
It grieves me sore to tell you so,
But ne'er-the less 'tis true."

"Pray, do not grieve," the widow cried,
"'Tis very fortunate;
For this same passion you avow
I do reciprocate!"
"But, madam, dear," he stammered forth,
"You do not understand;
You must proceed to court forthwith,
For such is the command."

"But, my dear sir, I much prefer
That you would take the lead,
For women are so very shy,
Oh, yes, they are, indeed.
I will be frank; I'll not refuse
If you the courting do;
But, pray, do not exact from me
The part which falls to you."

Amazement sat upon his brow,
He gasped to catch his breath;
And never will he paler grow,
E'en in the hour of death.
"Dear madam, you mistake my words,
This paper will explain.
You must, forthwith, accompany me
To Squire David Blaine."

She threw her arms about his neck,
And seemed almost to faint,
And on the collar of his coat
Left copious streaks of paint;
And clinging there, like ivy vine
About the sturdy oak,
'Twas full a moment ere again
Her voice the silence broke.

"How could you be so very bold
As to engage the Squire,
And even get the license, too,
Without knowing my desire."
With giant strength, he tore away
And ran like a gazelle.
And swore he'd never serve that writ,
No matter what befell.

—*Beecher W. Waltermeier, in Ohio Weekly Bulletin.*

WEEKLY DIGEST.

1. ABATEMENT AND REVIVAL—Where United States is a Party.—A state statute providing that, on the death of a defendant pending an action, the plaintiff shall not be entitled to recover against his estate unless he presents his claim to the executor or administrator, is not applicable to an action by the United States in a federal court on the bond of one of its officers.—Pond v. United States, U. S. C. C. of App., Ninth Circuit, 111 Fed. Rep. 989.

2. ACCOUNT—Permission to File Cross Bill.—Where, in an action for an accounting, the master finds a balance due defendant, it is not error to permit him to file a cross bill after the report is filed, to the end that a proper final decree may be made.—Sowles v. Hall, Vt., 50 Atl. Rep. 550.

3. ADMISSIONS—By Stipulation.—Where plaintiff, to avoid a continuance, stipulates that certain facts are true, a charge that the jury should take such facts as true is not objectionable as giving them undue prominence.—Galveston, H. & S. A. Ry. Co. v. Lynes, Tex., 66 S. W. Rep. 1119.

4. ADVERSE POSSESSION—By Mortgagor After Foreclosure.—After foreclosure of mortgage, the mortgagor remaining in possession may hold adversely to the purchaser at the foreclosure sale.—Garren v. Fields, Ala., 30 South. Rep. 775.

5. ADVERSE POSSESSION—Dispute as to Boundary Line.—Possession by a coterminous owner up to a line believed to be the true boundary may become adverse, if claimed as the true line.—Barrett v. Kelly, Ala., 30 South. Rep. 824.

6. ADVERSE POSSESSION — Loss of Constructive Possession.—Where an occupying claimant conveys that part of the tract which constitutes his actual possession, he loses his constructive possession of the balance, unless he takes actual possession of some part thereof.—Sharp v. Shenandoah Furnace Co., Va., 40 S. E. Rep. 103.

7. ADVERSE POSSESSION — Presumptions.—Open, notorious, uninterrupted possession of realty under claim of right will be presumed adverse from its inception.—Toltec Ranch Co. v. Babcock, Utah, 66 Pac. Rep. 876.

8. ALIENS—Validity or Chinese Exclusion Act.—Section 8 of the Chinese exclusion act of 1888, relating to the privilege of transit across the territory of the United States, was not dependent upon the ratification of the treaty then pending, but was independent legislation, and went into effect on its passage.—*In re* Lee Gon Yung, U. S. C. C., N. D. Cal., 111 Fed. Rep. 998.

9. ALTERATION OF INSTRUMENTS — Altered Deed as

Proof.—A deed in which the date was altered, and which appeared to be acknowledged before the date of the signature, held inadmissible as proof of plaintiff's title.—Long v. Stanley, Miss., 30 South. Rep. 823.

10. ANIMALS—Liability of Owner of Vicious Dog.—Where one is injured by a large dog jumping against him, the liability of the owner is the same, whether such acts result from viciousness or playfulness.—Crowley v. Groonell, Vt., 50 Atl. Rep. 546.

11. APPEAL—When Transfer of Cases Does Not Release Surety.—Where, on an appeal from the county to the district court, the place of trial is transferred to another county because of the judge having been of counsel, such transfer does not release the surety on the appeal bond.—Barela v. Tootle, Colo., 66 Pac. Rep. 899.

12. APPEAL AND ERROR—Conclusiveness of Language Used in Former Opinion.—Language used in the opinion on a former appeal, based on the supposition that the testimony then returned was true and undisputed, does not control on a second trial, where the evidence discloses a very different state of facts.—Neal v. Town of Marion, N. Car., 40 S. E. Rep. 116.

13. APPEAL AND ERROR — Different Rulings.—Where assignments of error, submitted together, complain of different rulings, and no proposition is submitted, they should not be considered.—Barrett v. Independent Tel. Co., Tex., 65 S. W. Rep. 1128.

14. APPEAL AND ERROR—Failing to Oppose Motion to Dismiss.—Where notice of motion to dismiss an appeal is served on appellant's counsel, and he fails to oppose the motion, the court may assume that the motion is confessed.—Means v. Stow, Colo., 66 Pac. Rep. 881.

15. APPEAL AND ERROR—Motion in Arrest of Judgment.—No appeal lies to the supreme court from a judgment granting a motion in arrest of judgment.—Brazel v. New South Coal Co., Ala., 30 South. Rep. 882.

16. APPEAL AND ERROR—Removing Trustee.—An order removing a trustee, unless cause be shown to the contrary within one month, held not appealable.—Chappell v. Clark, Md., 50 Atl. Rep. 527.

17. APPEAL AND ERROR—Reversal on Cross Appeal.—Where controlling question is raised by cross bill of exceptions, and judgment is reversed, writ of error on main bill will be dismissed.—Andrews v. Kinsel, Ga., 40 S. E. Rep. 800.

18. APPEAL AND ERROR — Where Evidence Fails to Support Verdict.—Where evidence wholly fails to support verdict and judgment entered thereon, it will be reversed.—Zienke v. Northern Pac. Ry. Co., Idaho, 66 Pac. Rep. 328.

19. ASSIGNMENTS FOR BENEFIT OF CREDITORS—Rights of Assignee.—In the absence of a statute giving the right, an assignee under a voluntary assignment for creditors takes no right of action, as against previous grantees or mortgagees, except such as the assignor himself would have had.—Crocker v. Huntzicker, Wis., 88 N. W. Rep. 232.

20. ATTORNEY AND CLIENT—Authority to File Suit.—Presumption that a duly-licensed attorney has authority to file a suit in behalf of an adult plaintiff laboring under no disability is not conclusive, but may be rebutted.—Bigham v. Kistler, Ga., 40 S. E. Rep. 808.

21. BANKRUPTCY—Allowance to Assignee Under General Assignment.—An assignee under a general assignment, where the assignor is adjudged bankrupt within four months, is entitled to an allowance for the actual and necessary expenses incurred in preserving the estate while in his possession, but not to any allowance for his services.—*In re* Tatum, U. S. D. C., E. D. N. Car., 112 Fed. Rep. 50.

22. BANKRUPTCY—Claim of Indorser of Bankrupt's Note.—An indorser of notes of a bankrupt, who paid the same after the bankruptcy, cannot be required, as a condition precedent to the proving of his claim thereon, to surrender the amount of other and separate notes held by the payee and paid by the bankrupt after insolvency under such circumstances that the payment could not be recovered back.—*In re* Siegel-Hilliman Dry Goods Co., U. S. D. C., E. D. Mo., 111 Fed. Rep. 980.

23. BANKRUPTCY—Jurisdiction of State Court.—Under Bankr. Act 1898, § 70, subd. "e," a state court will take cognizance of a suit by a trustee in bankruptcy to set aside a conveyance made void by Rev St. 1898, § 2320.—Mueller v. Bruss, Wis., 88 N. W. Rep. 229.

24. BANKRUPTCY—Requisite Number of Petitioners.—Where it appears that there are 12 or more creditors, an involuntary petition must be dismissed, unless at least 3 join therein, although the others may be creditors for merely nominal sums, who refuse to join through the solicitation of the debtor.—*In re* Brown, U. S. C. C. of App., Fifth Circuit, 112 Fed. Rep. 49.

25. BANKRUPTCY—Right of Bankrupt to Redeem from Sale of Trustee.—A court of bankruptcy has no power to grant leave to a creditor of a bankrupt to redeem from a sale of real estate made by the trustee under an order of the referee.—*In re* Novak, U. S. D. C., N. D. Iowa, 111 Fed. Rep. 978.

26. BANKRUPTCY—Rights of Trustee in Cases of Attachment.—Under Bankr. Act 1898, § 67, a trustee may retain attached property for the benefit of the estate, or, on an order from the court, may retain the benefit of the attachment.—Watschke v. Thompson, Minn., 88 N. W. Rep. 268.

27. BANKRUPTCY—Title of Trustee.—Bankr. Act 1898, § 70a, does not vest a trustee with a better title than the bankrupt had to property, merely because the latter might have transferred a better title to a *bona fide* purchaser.—*In re* Kellogg, U. S. D. C., W. D. N. Y., 112 Fed. Rep. 52.

28. BANKRUPTCY—Verification Where Petitioners are Corporations.—Where the petitioning creditors in a petition in involuntary bankruptcy are all corporations, a verification of the petition by their attorneys, shown to be duly authorized thereto and to be the persons most fully acquainted with the facts, is sufficient.—*In re* Chequasset Lumber Co., U. S. D. C., S. D. N. Y., 112 Fed. Rep. 56.

29. BANKS AND BANKING — Liability for Defect in Goods Sold Under Bill of Lading Forwarded by Them.—Where bills of lading for wheat were attached to drafts and forwarded to a bank for collection, no liability attached to the bank on defect in the quality of the wheat.—Commerce Milling & Grain Co. v. Morris Tex., 65 S. W. Rep. 1118.

30. BANKS AND BANKING—Set Off of Usury Against Note.—Usurious interest paid on a note given to a national bank cannot be set off in an action on the note, as the remedy given by Rev. St. U. S. § 5198, is conclusive.—Haseltine v. Central Nat. Bank, U. S. S. C., 22 Sup. Ct. Rep. 50.

31. BENEFIT SOCIETIES — What By-Laws are Void.—A by-law diverting a fund created for the benefit of the widows of the members of a produce exchange held void.—Parish v. New York Produce Exchange, N. Y., 61 N. E. Rep. 977.

32. BILLS AND NOTES — Advancements by Bankers.—Money paid by a banker, on checks of defendants drawn against a credit entered in their account by mistake, held an advancement by the banker, and secured by a note which defendants had given to secure advances.—Haines v. Cadwell, Oreg., 66 Pac. Rep. 910.

33. BUILDING AND LOAN ASSOCIATION—Existence of Unsecured Creditors.—The existence of unsecured creditors of an insolvent building and loan association does not affect the right of a receiver to make such settlement with borrowing stockholders as may be approved by the court.—Miles v. New South Building & Loan Assn., U. S. C. C., E. D. La., 111 Fed. Rep. 946.

34. CARRIERS—Holding Child in Overcrowded Cars.—Damages sustained by a passenger from holding a child, not her own, but under her care, while a pas-

senger on an overcrowded train, held not too remote.—Texas & P. Ry. Co. v. Rea, Tex., 65 S. W. Rep. 1115.

35. CARRIERS—Riding on Hand Car by Invitation.—A person riding on hand car at the invitation of section foreman held a trespasser.—Rathbone v. Oregon R. Co., Oreg., 66 Pac. Rep. 909.

36. CEMETERIES—Removing Wall.—Under V. S. §§ 5007, 5008, one removing a stone wall from about a burying ground held not liable, where it was not shown that the injury was done maliciously.—Town of Fletcher v. Kezer, Vt., 50 Atl. Rep. 558.

37. CHAMPERTY AND MAINTENANCE.—Contract employing attorneys to secure defendant's release from payment of subscription to a corporation held not tainted with champerty or maintenance.—Wheeler v. Harrison, Md., 50 Atl. Rep. 523.

38. CIVIL SERVICE—Right to Create Commission for City.—Legislature can create a civil service commission for the city of New Orleans, prescribing the members thereof.—Hope v. City of New Orleans, La., 30 South. Rep. 842.

39. CONSTITUTIONAL LAW—Imprisonment for Debt for Rent.—Rent due and unpaid constitutes a "debt" within Const. art. 1, § 15, prohibiting imprisonment for debt, and cannot be enforced by summary proceedings in contempt.—Knutte v. Superior Court of City and County of San Francisco, Cal., 66 Pac. Rep. 875.

40. CONSTITUTIONAL LAW—Statute Void in Part, When Valid as to Remainder.—Where portions of statute are unconstitutional, if the remainder is a complete act, it will be upheld, unless it was an inducement to the unconstitutional part.—Redell v. Moores, Neb., 88 N. W. Rep. 243.

41. CONTRACTS—For Bringing Feigned Suit.—A contract by a county for a sale of its bonds, conditioned that the purchaser shall cause a feigned suit to be brought and prosecuted to the supreme court of the state to determine the validity of the bonds prior to their issuance, is void, because the condition is contrary to public policy.—Van Horn v. Kittitas County, U. S. C. C., D. Wash., 112 Fed. Rep. 1.

42. CORPORATIONS—Acquiring Fixed Residence.—A foreign corporation doing business in the state held not to acquire a fixed residence by designating an agent upon whom process may be served.—Boyer v. Northern Pac. Ry. Co., Idaho, 66 Pac. Rep. 826.

43. CORPORATIONS—Director's Right to Contract for Medical Attendance.—A director of a corporation cannot bind it to pay for medical attendance on an injured employee, and evidence of his contract is not admissible.—Sias v. Consolidated Lighting Co., Vt., 50 Atl. Rep. 554.

44. CORPORATIONS—Discretion of Directors in Fixing Salary.—It is only where the directors of a corporation act in good faith that the courts will not interfere with their discretion in fixing the salaries of officers, or that there is any presumption in favor of the validity of their action.—Harrison v. Thomas, U. S. C. C. of App., Fifth Circuit, 112 Fed. Rep. 22.

45. CORPORATIONS—Failure to Annex Corporate Seal.—Where, in an action on a corporation's note no corporate seal appears on the copy of the note annexed to the affidavit of demand, the note is insufficient.—St. St. Joseph's Polish Catholic Beneficial Soc. v. St. Hedwig's Church, Del., 50 Atl. Rep. 535.

46. CORPORATIONS—Personal Liability of Stockholder.—California stockholders in a Colorado corporation, whose charter stated that its purpose was the transactions of business in California, held to have contracted with reference to the provisions of Civ. Code Cal. § 322, relating to personal liability of stockholders of a foreign corporation.—Pinney v. Nelson, U. S. S. C. 22 Sup. Ct. Rep. 52.

47. COSTS—Non-resident Complainant in Cross Bill.—Non-resident complainant in cross bill is not required to give security for costs.—Stein v. McGrath, Ala., 30 South. Rep. 792.

48. COSTS—Retaxing Costs.—Where a receipt given by appellant's counsel for less than the costs taxed as full payment thereof is set aside, and appellee moves that costs be retaxed, the sum so paid should be deposited with the clerk, or the retention held a ratification of counsel's act.—Page v. Yool, Colo., 66 Pac. Rep. 860.

49. COSTS—Small Recovery.—In an action for damages, where plaintiff recovered less than $300, he was not entitled to costs.—Kishlar v. Southern Pac. R. Co., Cal., 66 Pac. Rep. 848.

50. CRIMINAL EVIDENCE—Requisites of Dying Declaration.—Writing not signed by deceased, but certified to by a justice of the peace as containing a dying declaration, held inadmissible.—Green v. State, Fla., 30 South. Rep. 798.

51. CRIMINAL EVIDENCE—Statements to Attending Physician.—On the trial of defendant for murder, statements made by deceased to the attending physician an hour and a half after the assault held admissible as part of the *res gestæ*.—Chapman v. State, Tex., 65 S. W. Rep. 1098.

52. CRIMINAL EVIDENCE—When Declarations are Part of the Res Gestæ.—Statements of deceased, several hours after the burning which cause his death, in answers to interrogatories, held inadmissible as part of the *res gestæ*.—Faulkner v. State, Tex., 65 S. W. Rep. 1093.

53. CRIMINAL LAW—Aiding and Abetting Crime.—Where one conspirator commits a crime, and there is no proof that another, being present, knew of the intention and participated in it, or did any overt act indicating complicity in it, he cannot be held responsible therefor.—Renner v. State, Tex., 65 S. W. Rep. 1102.

54. CRIMINAL LAW—What is "Reasonable Doubt."—An instruction as to reasonable doubt, requiring it to be such doubt as would cause a man to hesitate in the "graver transactions of life," held erroneous.—McAllister v. State, Wis., 88 N. W. Rep. 268.

55. CRIMINAL LAW—Who is an Accomplice.—The test by which to determine whether a person is an accomplice to a crime is, could he be indicted for the same offense for which the principal is being tried?—State v. Jones, Iowa, 88 N. W. Rep. 196.

56. CRIMINAL TRIAL—Venue of Crime.—The right to be tried in the county where the offense was committed, under Const. 1885, Declarations of Rights, § 11, does not require that trial be had in such county, where an impartial jury cannot be obtained.—Hewitt v. State, Fla., 30 South. Rep. 795.

57. CUSTOMS DUTIES—Importations from Philippine Islands.—Goods brought from the Philippine Islands to the United States after the proclamation of the ratification of the treaty of peace between the United States and Spain held not imported from a foreign country and not subject to duty.—The Diamond Rings, U. S. S. C., 22 Sup. Ct. Rep. 59.

58. CUSTOMS DUTIES—Imports into Porto Rico.—The tax imposed on goods imported into Porto Rico under Act April 12, 1900, held not a tax or duty on articles exported from the United States within the meaning of Const. U S. art. 1, § 9.—Dooley v. United States, U. S. S. C., 22 Sup. Ct. 62.

59. DIVORCE—Right of Creditors to Enforce Claims Against Husband.—In a suit for divorce, jurisdiction to enforce certain claims of the husband's creditors out of property delivered to the wife pending investigation held to attach as incidental to the main suit, regardless of amount or value.—Bradley v. Ramsey, Tex., 65 S. W. Rep. 1112.

60. EJECTMENT—Equitable Estoppel.—The defense of an equitable estoppel may be made in an action in ejectment in a court of the United States.—National Nickel Co. v. Nevada Nickel Syndicate, U. S. C. C. of App., Ninth Circuit, 112 Fed. Rep. 44.

61. EMBEZZLEMENT—Necessary Allegations.—Indict-

ment for embezzlement need not allege from whom the money was received.—State v. Mathis, La., 30 South. Rep. 834.

62. EMINENT DOMAIN—Measuring Damages to Leasehold.—In measuring damages done to a leasehold interest in land, the value of the lease at the time of the injury is its fair market value.—Kishlar v. Southern Pac. R. Co., 66 Pac. Rep. 848.

63. EQUITY—Joint Actions in Equity.—Rule that, in a joint action, all the plaintiffs must recover, or none can, does not prevail in equity.—Bigham v. Kistler, Ga., 40 S. E. Rep. 303.

64. EVIDENCE—Admissions on Former Trial.—On second trial held error to allow witness for plaintiff to testify as to admissions made by defendant's witness at former trial.—Salley v. Manchester & A. R. Co., S. Car., 40 S. E. Rep. 111.

65. EVIDENCE—As to an Endeavor to Do a Certain Thing —A witness held entitled to testify that he tried to do a certain thing; his diligence not being in issue, and the extent of his endeavors being ascertainable by cross examination.—Turner v. State, Ga., 40 S. E. Rep. 308.

66. EVIDENCE—Judicial Notice.—The courts take judicial notice that wine is intoxicating.—Caldwell v. State, Fla., 30 South. Rep. 814.

67. EVIDENCE—Judicial Notice.—The supreme court will take judicial notice of the fact as to who is judge of a judicial district at any specified time.—Means v. Stow, Colo., 66 Pac. Rep. 881.

68. EVIDENCE—Letter-Book as Evidence. — Where, in an action for the price of goods sold, defendant denies having received any bill thereof, plaintiff's letter book, with copies of bills he mailed to defendant, are admissible.—Scott v. Bailey, Vt., 50 Atl. Rep. 557.

69. EVIDENCE—Mortality Tables as Evidence.—In an action for death, mortality tables held admissible in evidence.—Jones v. McMillan, Mich., 88 N. W. Rep. 206.

71. EXECUTORS AND ADMINISTRATORS—Diversion of Funds.—Where defendant was employed by plaintiff to assist in the management of the estates of which he was executor and trustee, the taking by defendant of his salary out of the funds collected in such employment with the knowledge and consent of plaintiff was not a diversion of such funds.—Sowles v. Hall, Vt., 50 Atl. Rep. 550.

72. EXECUTORS AND ADMINISTRATORS—Rights of Public Administrator over Estate of Non-Residents.—The right of the court to appoint an administrator for a deceased non-resident is discretionary, and the public administrator is not entitled to such appointment as a matter of right.—*In re* Harrison's Estate, Cal., 66 Pac. Rep. 846.

73. EXEMPTIONS—Wife of Pensioner.—Under Rev. St. U. S. § 4747, wife of pensioner held entitled to proceeds of pension check as against husband's creditors.—Bullard v. Goodno, Vt., 50 Atl. Rep. 544.

75. FERRIES—Right to Condemn Land.—A person to whom the proper board of supervisors has granted a ferry franchise has the right to maintain an action to condemn land for such ferry.—Pool v. Simmons, Cal., 66 Pac. Rep. 872.

76. FIRE INSURANCE—Determination of Total Loss.—In determining whether there was a total loss by fire, evidence of the value of the remaining parts of the building and the cost of reconstruction held admissible.—Northwestern Mut. Life Ins. Co. v. Sun Ins. Office, Minn., 88 N. W. Rep. 272.

78. FRAUDS, STATUTE OF—Agent's Agreement for Sale of Land.—An agreement with agents for the sale of realty held within the statute of frauds, so that no recovery of commissions can be had, if not in writing.—Abbott v. Hunt, N. Car., 40 S. E. Rep. 119.

78. FRAUDS, STATUTE OF—Oral Agreement to Devise Lands.—An oral agreement to devise lands for services to be performed is not taken out of the statute of frauds by the mere performance of the services.—Rodman v. Rodman, Wis., 88 N. W. Rep. 218.

79. FRAUDS, STATUTE OF—Transfer of Accounts.—Transfer of accounts by parol held not within the statute of frauds.—Shove v. Martine, Minn., 88 N. W. Rep. 254.

80. FRAUDULENT CONVEYANCES — Admissions of Grantor.—Declaration of grantor that conveyance was fraudulent held admissible, where it was part of a conversation drawn out by grantee claiming title.—Moulton v. Sturgis Nat. Bank, Tex., 65 S. W. Rep. 1114.

81. FRAUDULENT CONVEYANCES—Mortgage to Secure Antecedent Debt.—A mortgage by a buyer solely to secure an antecedent debt is void as against the seller of the mortgaged property, where the sale was induced by fraud of the buyer.—Adam, Meldrum & Anderson Co. v. Stewart, Ind., 61 N. E. Rep. 1002.

82. FRAUDULENT CONVEYANCES — Return of Consideration.—Where part of the consideration received by an insolvent on making a conveyance in fraud of creditors is used to pay his debts, it should be deducted from the amount chargeable against the grantee.—Crocker v. Huntzicker, Wis., 88 N. W. Rep. 282.

83. HABEAS CORPUS — To Review Proceedings in Lower Court.—Writ of *habeas corpus* cannot be upheld as a writ of error to review proceedings in a criminal case in the state court.—Storl v. Commonwealth of Massachusetts, U. S. S. C., 22 Sup. Ct. Rep. 72.

84. HIGHWAYS — Power of Police Juries.—A police jury has full power as to establishment of public roads and their discontinuance, and can establish a toll road on the site of a free road.—St. Joseph Plank Road Co. v. Kline, La., 30 South. Rep. 854.

85. HOMICIDE — Evidence of Threats.—In a prosecution for murder, evidence of threats made by the prisoner is admissible.—State v. Rose, N. Car., 40 S. E. Rep. 83.

86. HOMICIDE—Instruction as to Who are Principals —A charge that if defendant was an owner of the saloon in which a murder was committed and was present and knew of the murder, he was guilty as a principal, held error.—Chapman v. State, Tex., 65 S. W. Rep. 1098.

87. HOMICIDE — Self-Defense.—A person will not forfeit his right to take the life of another in self-defense by fact that his own acts provoked, and were reasonably calculated to provoke, the difficulty.—Thornton v. State, Tex., 65 S. W. Rep. 1105.

88. HOMICIDE — When Justifiable.—A brother may slay another to prevent forcible felony upon his sister.—Mitchell v. State, Fla., 30 South. Rep. 803.

89. INDICTMENT — Correcting Errors.—The prosecuting attorney may correct an error in indorsing name of witness on information, where no prejudice is shown.—State v. McGann, Idaho, 66 Pac. Rep. 823.

90. INJUNCTION—Liability on Bond.—Liability on injunction bond includes fees of counsel for investigation and for services rendered in any proceeding had for a dissolution of the writ.—Bush v. Kirkbride, Ala., 30 South. Rep. 780.

91. INJUNCTION—Right to Restrain Alteration of Building Contrary to Ordinance.—A party not specially interested held not entitled to an injunction restraining the alteration of a building in contravention of an ordinance requiring a permit.—O'Brien v. Louer, Ind., 61 N. E. Rep. 1004.

92. INSANE PERSONS—Mandamus to Compel Hearing of Application to be Declared Sane.—*Mandamus* will not lie to compel a court to determine an application by a lunatic to be adjudged sane, where it has dismissed his application, there being an adequate remedy by appeal.—Aldrich v. Superior Court of City and County of San Francisco, Cal., 66 Pac. Rep. 846.

93. INTOXICATING LIQUORS—Revoking License Without Refunding.—Municipal authorities held to have power to revoke liquor license without refunding

money paid therefor.—Melton v. City of Moultrie, Ga., 40 S. E. Rep. 302.

94. INTOXICATING LIQUORS—Sale of Sham Wine.—Under indictment charging unlawful sale of wine, it is competent to prove that a sale of a different article was a sham for the sale of wine.—Caldwell v. State, Fla., 30 South. Rep. 814.

95. IRRIGATION—Right to Condemn Land.—In a proceeding under the statute to condemn land for a ditch and reservoir for irrigation purposes, the commissioners cannot consider whether the contemplated scheme is feasible or practicable.—Gibson v. Cann, Colo., 66 Pac. Rep. 879.

96. JUDGES—Son of Judge as Counsel.—Where, in an action against a railroad company for personal injury, plaintiff's counsel, who is a son of the trial judge, is prosecuting the suit for a percentage of the amount of the recovery, such facts do not disqualify the judge from presiding at the trial, or require a continuance at defendant's request.—Allison v. Southern Ry. Co., N. Car., 40 S. E. Rep. 91.

97. JUDGMENT—Abandonment of Suit.—That an attorney abandoned a suit before trial held not to prevent a decree in favor of the defendant therein from being *prima facie* binding on the plaintiff.—Bigham v. Kistler, Ga., 40 S. E. Rep. 303.

98. JUDGMENT—Conclusive Effect of Dismissal for Want of Jurisdiction.—A judgment dismissing a cause for want of jurisdiction of the amount involved is not an adjudication on the merits, and will not bar a new suit, or prevent an amendment showing the amount to be within the jurisdiction of the court.—Jecker v. Phytides, Tex., 65 S. W. Rep. 1129.

99. JUDGMENT—Res Judicata.—Where the same issues are submitted as determined by verdict and judgment in a former action between the same parties, they were *res judicata*.—Keene v. Lobdell, Minn., 88 N. W. Rep. 251.

100. JUDGMENT—Res Judicata.—Ratification by court of account of receivers of an insolvent corporation, allowing certain expenses, held *res judicata*, both as to the account and as to the fund on which it was chargeable.—National Marine Bank v. Heller, Md., 50 Atl. Rep. 521.

101. JURY—Failure to Disclose Relationship.—Failure of two jurors, relatives of the defendant, to disclose their relationship, held to authorize a reversal of a judgment on a verdict in favor of defendant.—Davis v. Searcy, Miss., 30 South. Rep. 828.

102. JURY—Improper Challenge.—In a criminal prosecution, a principal challenge, on the ground that the jurors had served on a jury which convicted another person of the same offense, held properly overruled.—Turner v. State, Ga., 40 S. E. Rep. 308.

103. LARCENY—Taking Under Claim of Right.—Where a person takes goods under a *bona fide* claim of right, whether he has any claim either in law or in fact, he cannot be convicted of larceny.—State v. Pullen, Del., 50 Atl. Rep. 538.

104. LIMITATION OF ACTIONS—Proof of New Promise.—In an action to foreclose after limitation has run, testimony of plaintiff that at request of defendant she agreed to remit a portion of the debt is not proof of a new promise to pay.—Weinberger v. Weidman, Cal., 66 Pac. Rep. 869.

105. LIS PENDENS — Bill for Division.—Purchaser, pending bill by tenant in common for sale for division, takes subject to litigation.—Stein v. McGrath, Ala., 30 South. Rep. 792.

106. MANDAMUS—To Compel Selectmen to Allow Damages.—Where selectmen of a town refused to issue a town order for an amount allowed plaintiff by the town for damages, he had an adequate remedy at law, and mandamus would not lie to compel issuance of the order.—Farr v. Town of St. Johnsbury, Vt., 50 Atl. Rep. 548.

107. MANDAMUS—To Compel Comptroller to Collect Tax.—A taxpayer cannot maintain mandamus to compel the state comptroller to sue to collect a tax imposed on the gross receipts from the passenger travel of railroads and steamships operating within the state.—Lewright v. Love, Tex., 65 S. W. Rep. 1089.

108. MARITIME LIENS—Medical Treatment of Stowaway.—A vessel is not liable for the medical treatment of a stowaway, injured while assisting the crew in the navigation of the vessel, although after his discovery he was required by the master to sign the shipping articles for the voyage; nor has the master authority to pledge the credit of the vessel for his treatment.—The Laura Madsen, U. S. D. C., D. Wash., 112 Fed. Rep. 72.

109. MASTER AND SERVANT—Giving Warning of Danger. An employer held not required to give an adult employee, in possession of ordinary good sense, warning of the existence of danger from contract with a rapidly revolving metallic shaft.—Commercial Guano Co. v. Neather, Ga., 40 S. E. Rep. 299.

110. MASTER AND SERVANT—Linemen Assume Risk of Employment.—An experienced lineman for an electric lighting company held to assume the risk in climbing poles without examining them as to soundness.—Sias v. Consolidated Lighting Co., Vt., 50 Atl. Rep. 554.

111. MINES AND MINERALS—Discovery Within Existing Location.—A location of a mining claim, based on a discovery of mineral within the limits of another existing and valid location, is void.—Tuolumne Consol. Min. Co. v. Maier, Cal., 66 Pac. Rep. 863.

112. MORTGAGES—Receiver's Lease of Property.—A contract made by a receiver appointed in a foreclosure suit, with the approval of the court, leasing property involved in the suit pending its sale, is binding on the mortgagee, although it is not a formal party thereto.—Western Union Tel. Co. v. Boston Safe Deposit & Trust Co., U. S. C. C. of App., Second Circuit, 112 Fed. Rep. 37.

113. MORTGAGES — Specifying Time of Sale.—Words "within lawful hours," in a deed of trust, held not to require sale on a day prescribed in a statute specifying the hours on such day when sales should be made.—Thompson v. Cobb, Tex., 65 S. W. Rep. 1090.

114. MORTGAGES — Validity of Statute Requiring Sale on a Certain Day.—A statute requiring sales under deeds of trust to be made on a certain day of the month is unconstitutional, as applied to a deed executed before its passage and providing for sale "at any time" after default.—Thompson v. Cobb, Tex., 65 S. W. Rep. 1090.

115. MUNICIPAL CORPORATIONS—Appointment of Fire and Police Commissioners.—The legislature may confer on the governor power to appoint members of the board of fire and police commissioners of cities of the metropolitan class.—Redell v. Moores, Neb., 88 N. W. Rep. 243.

116. MUNICIPAL CORPORATIONS — Approval of Minutes.—The approval of the minutes of a special meeting of a city council at the following regular meeting is not a ratification of the acts of the special meeting.—Mills v. City of San Antonio, Tex., 65 S. W. Rep. 1121.

117. MUNICIPAL CORPORATIONS—Extending Drain.—A city, authorized to construct drains and to do acts generally necessary to protect the public health, has power to extend a drain to a proper outlet beyond the city limits.—Minnesota & M. Land & Improvement Co. v. City of Billings, U. S. C. C. of App., Ninth Circuit, 111 Fed. Rep. 972.

118. MUNICIPAL CORPORATIONS—Implied Contract to Pay for Services of Street Supervisors.—Where the duties and salary of a street supervisor are prescribed by ordinance, there is no implied contract to pay him for services for which no compensation is prescribed.—City of Durango v. Hampson, Colo., 66 Pac. Rep. 888.

119. MUNICIPAL CORPORATIONS—Snow and Ice on Sidewalk.—A depression in a sidewalk, partially cov-

ered with snow and ice, held not an actionable defect.—Koepke v. City of Milwaukee, Wis., 88 N. W. Rep. 238.

120. NEGLIGENCE — Intervention of Independent Criminal Act.—Where, between alleged negligence of defendant and damages sustained by plaintiff, an independent criminal act intervened, the petition will be dismissed on general demurrer.—Andrews v. Kinsel, Ga., 40 S. E. Rep. 300.

121. NEGLIGENCE—When Contributory Negligence is no Defense.—In action for injuries at crossing, plaintiff can recover, notwithstanding contributory negligence, if defendant, after knowledge of peril, could have avoided the injury.—Memphis & C. R. Co. v. Martin, Ala., 30 South. Rep. 821.

122. NEW TRIAL—Error in Instructions.—Where there is no error in admitting or rejecting evidence, and a verdict is demanded by the law and evidence, it is error to grant a new trial for error in the instructions.—Commercial Guano Co. v. Neather, Ga., 40 S. E. Rep. 299.

123. NEW TRIAL—Specifying Particulars.—Where a statement for new trial does not specify the particulars in which it is alleged the evidence is insufficient, as required by Code Civ. Proc. § 1173, such question cannot be considered on appeal.—King v. Lincoln, Mont., 66 Pac. Rep. 836.

124. NONSUIT—When Nonsuit is Error.—Awarding nonsuit held error, where evidence for plaintiff authorizes finding that he has proved his case as laid.—Flewellen v. Flewellen, Ga., 40 S. E. Rep. 301.

125. PARTIES—Departure by Substitution of Names.—Where suit is brought in the name of a corporation, an amendment substituting the name of another corporation is a departure which cannot be allowed.—Vinegar Bend Lumber Co. v. Chicago Title & Trust Co., Ala., 30 South. Rep. 776.

126. PARTITION—Accounting of Rents and Profits.—Where court acquires jurisdiction of property for division between co-tenants, it may require accounting by tenant in possession of rents and profits.—Stein v. McGrath, Ala., 30 South. Rep. 792.

127. PAYMENT—By Married Women.—Exclusion of evidence of payment in chattels, on the ground that the plaintiff was a married woman and was only bound by payment in cash, held error, where it nowhere appeared that plaintiff was a married woman.—Edgerton v. West, Fla., 30 South. Rep. 797.

128. PAYMENT—Recovery.—Vendees of stock of bank, which refused to transfer the same held entitled to recover money paid out from the vendor.—Davis v. National Eagle Bank, R. I., 50 Atl. Rep. 530.

129. PERSONAL INJURIES—Furnishing Nurse as Evidence of Liability.—In an action by a servant for personal injuries, it was error to permit evidence that defendant had furnished plaintiff a nurse, as tending to show a recognition of liability.—Sias v. Consolidated Lighting Co., Vt., 50 Atl. Rep. 554.

130. PHYSICIANS AND SURGEONS—Persons Practicing Obstetrics.—A person practicing obstetrics is within the statute requiring a license for practicing medicine or surgery.—State v. Welch, N. Car., 40 S. E. Rep. 120.

131. PLEADING—Independent Pleas.—Under Code, § 699, in order to take advantage of any special defenses, an independent plea must be incorporated in answer to bill in equity.—Stein v. McGrath, Ala., 30 South Rep. 792.

132. PLEADING—What Constitutes a Departure.—The test of a departure is not that the same evidence should support both the original and amended petitions, nor that a larger sum is claimed in the second petition, but simply that the subject-matter or transaction itself is identical.—Stewart v. Van Horne, Mo. App., decided at St. Louis Jan. 27, 1902, not yet reprinted.

133. PRINCIPAL AND AGENT—Liability of Agent in Making Loan.—An agent authorized to loan money is not chargeable with the amount of an unpaid loan, unless guilty of negligence in making it.—Haines v. Christie, Colo., 66 Pac. Rep. 883.

134. PRINCIPAL AND SURETY—Failure to Notify Sureties.—The failure of the treasury department to promptly notify the sureties on the bond of a collector of internal revenue of a defalacation by their principa does not discharge them from liability.—Pond v. United States, U. S. C. C. of App., Ninth Circuit, 111 Fed. Rep. 989.

135. PROCESS—Proof of Proper Service.—A constable in case of doubt as to names should be permitted to point out the individual to whom he read the summons.—Murdock v. Mercurio, Mo. App., decided at St. Louis, Jan. 27, 1902, not yet reprinted.

136. PROHIBITION—Injunction Against Enforcement of City Ordinances.—Where persons guilty of violating ordinances enjoin the enforcement of the ordinances against them, an appeal from which judgment is pending, the city is not entitled to a writ of prohibition against the injunction on the ground that the injunction deprives it of authority to enforce the ordinances.—People v. District Court of Second Judicial District of Colorado, Colo., 66 Pac. Rep. 888.

137. PUBLIC LANDS—Conclusiveness of Patent.—A patent of the United State held conclusive as to the description of the land granted.—Miller v. Grunsky, Cal., 66 Pac. Rep. 858.

138. PUBLIC LANDS—Contest Pending in Land Department.—The federal courts are without jurisdiction to entertain a suit to determine the respective rights of the parties in land, the title to which remains in the United States, and in regard to which a contest between the parties is pending in the land department.—Comos Exploration Co. v. Gray Eagle Oil Co., U. S. C. C. of App., Ninth Circuit, 112 Fed. Rep. 4.

139. PUBLIC OFFICER—Conductor on Train.—A conductor on a passenger train is not a "public officer," within the statute relating to appeals.—Wyman v. Hayes, Vt., 50 Atl. Rep. 556.

140. RAILROADS—Failure to Ring Bell as Negligence.—The failure of an engineer to ring the bell or blow the whistle held, in an action for death, not evidence of negligence, but merely a fact to be considered on the question whether a proper lookout was kept by the engineer.—McArver v. Southern Ry. Co., N. Car., 40 S. E. Rep. 94.

141. RAILROADS—Killing Animals.—The owner of a dog held not entitled to recover for his killing on a railroad track without the knowledge of the defendant's servants.—Mobile & O. R. Co. v. Holiday, Miss., 30 South. Rep. 820.

142. RAILROADS—Negligence of Independent Contractor.—A railroad company carrying the highway over its tracks held liable for injury to a traveler caused by the negligence of an independent contractor.—Deming v. Terminal Ry. of Buffalo, N. Y., 61 N. E. Rep. 983.

143. RECEIVERS—Leave to Sue Receiver Granted in Vacation.—Under Code, §§ 336, 379, a resident judge of the superior court has authority to grant leave in vacation to sue a receiver appointed in term time by another judge holding court in the district.—Wilson v. Rankin, N. Car., 40 S. E. Rep. 310.

144. REMOVAL OF CAUSES — Filing Petition.—The mere filing of a petition for the removal of a cause into a federal court does not, *ipso facto*, entitle the party filing it to such a removal.—Colorado Fuel & Iron Co. v. Four Mile Ry. Co., Colo., 66 Pac. Rep. 902.

145. REMOVAL OF CAUSES—What is Mint Controversy.—A suit in a state court between a state and foreign corporation held not removable as a controversy between citizens of different states.—State of Arkansas v. Kansas & T. Coal Co., U. S. S. C., 22 Sup. Ct. Rep. 47.

146. SALES—Defenses of Purchase.—In an action for breach of contract of sale, the plaintiff must show

either that the goods were not delivered or that they were not according to sample.—Love v. Barnesville Mfg. Co., Del., 50 Atl. Rep. 536.

147. SALES—Refusal to Pay for Installment as Excuse for Subsequent Delivery.—Where a purchaser refused to pay for an installment of the goods delivered, held, that the vendor was relieved from a subsequent delivery of the balance.—Leonard v. Johnson Forge Co., Del., 50 Atl. Rep. 541.

148. SALES—Right of Seller to Reclaim Chattels.—A seller of chattels, where the sale was induced by fraud, cannot maintain an action to reclaim such chattels without first paying or tendering the amount he has received on account of the sale.—Adam, Meldrum & Anderson Co. v. Stewart, Ind., 61 N. E. Rep. 1003.

149. SALVAGE — Exaggerated Claims.—Where a libelant made greatly exaggerated claims for salvage services and towage, he will not be allowed interest on the amount recovered.—Merritt & Chapman Derrick & Wrecking Co. v. Chubb, U. S. C. C. of App., Second Circuit, 111 Fed. Rep. 1003.

150. TAXATION—Invalid Tax Sales.—A tax deed obtained at a sale of land for delinquent taxes, a part of which were levied on the value of improvements on another parcel of land, is invalid.—Cramer v. Armstrong, Colo., 66 Pac. Rep. 889.

151. TAXATION—Notice to Redeem.—Under Pol. Code, § 3785, as amended by St. 1891, p. 134, an affidavit of a purchaser at a tax sale that notice to redeem was duly posted and published, held *prima facie* evidence of such publication.—Walsh v. Burke, Cal., 66 Pac. Rep. 866.

152. TELEGRAPHS AND TELEPHONES — Burden of Showing Illegal Contract.—Where, in an action for failure to deliver a telegram as sent, the company defend on ground that it related to an illegal contract, the burden is on defendant to show such fact.—Western Union Tel. Co. v. Hill, Tex., 65 S. W. Rep. 1123.

153. TENANCY IN COMMON — Conversion Against Co-Tenant.—A co-tenant of chattels held entitled to maintain conversion against his co tenant, on his refusal to divide such chattels.—Gates v. Bowers, N. Y., 61 N. E. Rep. 993.

154. TERRITORIES—Title of United States to Philippine Islands.—Legal title of the United States to the Philippine Islands held unaffected by the continuance of the insurrection by those who had been previously in insurrection with Spain.—The Diamond Rings, U. S. S. C., 22 Sup. Ct. Rep. 59.

155. TREATIES—Affected by Senate Resolution Passed by Less than Two Thirds.—The treaty of peace by which the Philippine Islands were ceded to the United States cannot be controlled by a senate resolution, passed by less than two-thirds of a quorum, that it was not intended to permanently annex the islands.—The Diamond Rings, U. S. S. C., 22 Sup. Ct. Rep. 59.

156. TRIAL—Right of Jury to View.—Whether, in an action for injuries caused by an alleged defective sidewalk, the jury may be taken to view the premises, is within the discretion of the court.—Koepke v. City of Milwaukee, Wis., 88 N. W. Rep. 288.

157. TRIAL — Temporary Absence of Trial Judge.—Temporary absence of trial judge from the court room held not prejudicial error.—Chicago City Ry. Co. v. Anderson, Ill., 61 N. E. Rep. 999.

158. TRIAL AND PROCEDURE—Effect of Judge's Sleeping at Trial.—Trial judge held not to have committed prejudicial error by sleeping during the introduction of evidence.—Chicago City Ry. Co. v. Anderson, Ill., 61 N. E. Rep. 999.

159. TRIAL AND PROCEDURE—Jury Bound by Instructions.—The jury is bound by the law given by the court, whether correct or not.—King v. Lincoln, Mont., 66 Pac. Rep. 886.

160. TRIAL AND PROCEDURE — Limit to Cumulative Evidence.—Where six witnesses have testified to a fact, another will not be permitted to testify to the same thing.—Love v. Barnesville Mfg. Co., Del., 50 Atl. Rep. 536.

161. TRUSTS AND TRUSTEES — Absence of Trustee Pending Proceedings for Removal.—A trustee, by absenting himself from the state pending proceedings for his removal and refusing services of petitions, cannot deprive the court of jurisdiction; but it may proceed under Code, art. 16, § 105, and Acts 1896, ch. 38.—Chappell v. Clarke, Md., 50 Atl. Rep. 527.

162. TRUSTS AND TRUSTEES — Adequate Remedy at Law.—The fact that there is a remedy at law cannot keep a court of equity from following a trust fund.—Farrell v. Farrell, Mo. App., decided at St. Louis, January 27, 1902, not yet reported.

163. TRUSTS AND TRUSTEES—Rights of Trust Companies.—Gen. St. §§ 2841 2854, relating to the organization of trust companies, does not affect the rule that trustee cannot purchase at his own sale.—St. Paul Trust Co. v. Strong, Minn., 88 N. W. Rep. 253.

164. VENDOR AND PURCHASER — Priority of Unrecorded Deed Over Quitclaim.—An unrecorded deed is superior to a quitclaim from a common grantor, whether the grantor or the grantee was in possession when the quitclaim was given or not.—Messenger v. Peter, Mich., 88 N. W. Rep. 209.

165. VENDOR AND PURCHASER—Secret Limitations in Deeds.—A secret limitation in a grant of a water right does not affect a *bona fide* purchaser from the grantee, in the absence of any notice, express or implied, of such limitation.—King v. Ackroyd, Colo., 66 Pac. Rep. 906.

166. WATERS AND WATER COURSES — "Appurtenances" as Including Water Rights.—A water right used in irrigating lands passes by a conveyance of the lands under the term "appurtenances," if the grantor so intends.—King v. Ackroyd, Colo., 66 Pac. Rep. 906.

167. WATERS AND WATER COURSES—Irrigation Privileges.—Under Acts 1898, No. 26, a canal company furnishing water for irrigation has no privilege, in the absence of an agreed price.—Ferre Canal Co. v. Burgin, La., 30 South. Rep. 863.

168. WATERS AND WATER COURSES — Rights of Riparian Owner.—Rights of riparian owner held subordinate to and subject to appropriation for public improvements of navigable river.—Slingerland v. International Contracting Co., N. Y., 61 N. E. Rep. 995.

169. WILLS—Charging Real Estate with Debts.—Where a testator, after making his will, incumbers a portion of the lands devised, and by his will makes his real estate chargeable with the payment of his debts, all his real estate must contribute to pay such incumbrance.—Frasier v. Littleton's Exrs., Va., 40 S. E. Rep. 108.

170. WITNESSES—Discrediting Witness.—Testimony as to business transactions tending to discredit witness held incompetent.—Gates v. Bowers, N. Y., 31 N. E. Rep. 993.

171. WITNESSES — Grounds of Impeachment.—Evidence to impeach a witness must, except on his cross-examination, be confined to proof of his general reputation at the place of his residence.—Swanson v. Andrus, Minn., 88 N. W. Rep. 252.

172. WITNESSES—Impeaching Witness by Testimony at Previous Trial.—Where defendant introduced part of the previous testimony of one of plaintiff's witnesses to impeach him, the balance was properly admitted.—Thornton v. State, Tex., 65 S. W. Rep. 1105.

173. WITNESSES—Refreshing Memory of Witness.—A bank clerk, who kept the books and knew them to be correct, in testifying to an account, may refresh his memory with memoranda copied from the books and carefully compared by him, if after so using it he can testify from memory as to the original transactions. Haines v. Cadwell, Oreg., 66 Pac. Rep. 910.

174. WITNESSES—Right to Impeach.—A party cannot impeach a witness who is not hostile to him.—Davis v. Buchanan, Vt., 50 Atl. Rep. 545.